U.S. RELATIONS WITH COLOMBIA

Y 4. F 76/1: C 71/3

U.S. Relations With Colombia, 103-2...

JOINT HEARING

BEFORE THE

SUBCOMMITTEES ON
INTERNATIONAL SECURITY, INTERNATIONAL
ORGANIZATIONS AND HUMAN RIGHTS

AND

THE WESTERN HEMISPHERE

OF THE

COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

AUGUST 3, 1994

Printed for the use of the Committee on Foreign Affairs

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U.S. RELATIONS WITH COLOMBIA

WEDNESDAY, AUGUST 3, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON INTERNATIONAL SECURITY, INTERNATIONAL ORGANIZATIONS AND HUMAN RIGHTS, AND SUBCOMMITTEE ON THE WESTERN HEMISPHERE,
Washington, DC.

The subcommittee met, pursuant to call, at 2 p.m. in room 2200, Rayburn House Office Building, Hon. Robert G. Torricelli (chairman of the Subcommittee on the Western Hemisphere) presiding.

Mr. TORRICELLI. The committee will please come to order.

Six weeks ago, the Western Hemisphere and the International Security Subcommittee held a joint hearing on the administration's counternarcotics strategy for the hemisphere. Our specific concern was a new legal ruling by the executive branch that was preventing the United States from sharing radar intelligence with our Andean neighbors.

We believed that the cessation of information was having an extremely detrimental impact on our drug interdiction activities, and perhaps an even more troubling impact on the state of U.S. relations with our neighbors.

I believe that I speak for my colleagues in saying that when we left that hearing some 6 weeks ago, we all felt we had received a guarantee from the State Department that our Government and the governments in the region were going to resume a level of close narcotics cooperation. While a final solution to the radar intelligence problem awaited congressional action, we were informed that an interim agreement which would allow a resumption of information sharing would be negotiated with Colombia and Peru in "a matter of days."

As we meet this afternoon, however, the information sharing still has not resumed. And, as a result of that circumstance, as well as several other troubling developments, relations between Colombia and the United States have reached a troubling area. Indeed, recent events and U.S. policy shifts have created confusion and outrage in Colombia and have left the impression that the United States is retreating from our war on drugs.

Today, we hope to analyze the sources of tension in the United States' relationships with Colombia with two officials from the United States Department of State. Ambassador Gelbard, Assistant Secretary for International Narcotics Matters; and Ambassador Skol, Principal Deputy Assistant Secretary for Inter-American Affairs. Also present to answer legal questions is Teresa

Roseborough, Deputy Assistant Attorney General from the Office of Legislative Counsel at the Justice Department.

The Clinton administration cannot afford to send mixed signals to Colombia on issues as important as the war on drugs. Nor can the narcotraffickers have any doubts about American resolve on this matter.

Only last fall, the United States hailed Colombia for dismantling the violent Medellin cocaine cartel, for its efforts to reduce drug production, and for battling narco-related corruption. Despite recent tensions, the United States and Colombia must not lose sight of the fact that it will take a great deal of combined effort to tackle drug trafficking at its source.

Many aspects of our relationship with Colombia are positive. I hope today we will accomplish what our earlier hearing set out to do, indeed what I believe members of this committee believed already had been achieved, and that was a reaffirmation of our two countries' commitment to work together to fight the war on drugs.

Mr. Lantos, do you have a statement you would like to make at this point?

Mr. LANTOS. Just a very brief comment, Mr. Chairman.

Let me first say that I want to commend you and congratulate you for calling this hearing. It is in keeping with your role as one of the principal and most effective voices on foreign policy in the Congress. And I want to identify myself fully with your opening statement.

Ms. Roseborough and gentlemen, it is a pleasure to have you before this joint hearing of the subcommittees. Although this hearing is on the broader issue of U.S.-Colombian relations, we were interested to hear what the current status of the issue of intelligence sharing with both Colombia and Peru is. At our last hearing, Ambassador Gelbard, you testified that we would have interim agreements with Colombia and Peru that would allow us to restart the intelligence sharing, I believe you said, within 48 hours or before the end of that week.

It is now about a month later, and we have not been able to restart this extremely important effort. We want to hear in detail from you what the administration has been doing on this issue in the last 4 weeks, and what the reasons are for not being able to conclude these agreements.

On the broader issue of U.S.-Colombian relations, our colleagues' cooperation is and will remain one of the central aspects of our bilateral relationship with Colombia. As such, and as the largest producer and consumer of cocaine respectively, we need to ensure that we work effectively to combat narcotics production and trafficking as well as consumption here in the United States.

But in order to have effective cooperation, what is needed is trust on both sides. Some recent events have caused a significant lessening of trust between the United States and Colombia.

We hope that cooperation with Colombia might continue. But we need to be very clear that it has to be effective cooperation. In order for us to continue to justify assistance to Colombia, we must be able to show concrete results from that assistance.

With respect to the Cali cartel, there have up until now been no results. No results. Congress expects strong, effective action

against narcotics production and trafficking in order to maintain continued support both for direct bilateral assistance and for other forms of assistance. This must include arrest and effective prosecution of the Cali cartel leaders, including appropriate prison sentences and reasonable forfeiture of assets derived from narcotics trafficking.

It must also include a continued commitment to the opium and coca eradication program.

I look forward to listening to your testimony and raising several issues with you as we go along.

Thank you, Mr. Chairman.

Mr. TORRICELLI. Mr. Lantos, thank you for your comments and for your very kind remarks.

Mr. Smith.

Mr. SMITH. Thank you very much, Mr. Chairman.

Today's hearing is designed to address a range of issues relating to U.S.-Colombia relations. Clearly the most serious issue facing our relations with Colombia is the war against drug traffickers. In recent months, U.S. relations with Colombia have become strained and more complicated because of the U.S. decision to cease intelligence sharing with Colombia until certain legal questions are clarified.

As has been pointed out, Ambassador Gelbard, at our last hearing on June 22, you assured us that "what we intend to do is try to establish very, very quickly, interim agreements with those governments (in Peru and Colombia) that would permit us to resume the provision of real-time tracking data as quickly as possible, and I would hope even before the end of the week."

Six weeks later, Mr. Chairman, we still do not have, to the best of my knowledge, a resolution of that problem.

Parenthetically I would note that I met with President Fujimori just 2 weeks ago in Lima as part of a wide-ranging series of talks on human rights and trade, as well as drug trafficking. President Fujimori was incredulous that the United States has ceased to provide the information which has been so useful in interdicting drug traffickers.

As a matter of fact, the DEA recently estimated that there has been at least a 20 percent increase in shipments via aircraft. Such statistics obviously bode ill for my constituents and all Americans who are put at peril by drug use and cocaine abuse.

I would also point out that there are reports with respect to the campaign contributions made to President-elect Samper, which were allegedly received from the Cali cartel.

Again, during our last hearing, Ambassador Gelbard, you related damaging reports of contributions which the gentleman had received. You indicated that, "We are looking into this to try to determine the veracity of this kind of information."

I remain concerned, Mr. Chairman, about these reports. I hope we can be updated about that aspect as well.

I did receive a letter dated July 15 from the President elect, which said, "I am completely confident that my campaign was successful in rejecting drug traffickers' undercover efforts to spread their corrupting influence." And he too, I will note for the record, has called for an investigation.

In addition, Mr. Chairman, as noted in Amnesty International's recent report entitled "Colombia: Political Violence," the country is, "plagued by internal conflict and appalling levels of violence . . . Many . . . victims of political violence in Colombia died in confrontations between guerrillas and government forces." There are allegations that U.S. "aid destined to combat drug-trafficking was diverted to finance counterinsurgency operations."

Hopefully our distinguished witnesses can speak to the possibility of such diversions, especially in light of Amnesty's call dated July 26 for a suspension of military assistance to Colombia because of those allegations, and the potential for dual use of U.S. military assistance. Perhaps one week those monies are used to help a counterinsurgency which may be aiding and abetting human rights abuses, while another week the forces are working to interdict and to stop the drug traffickers.

If you could respond to these issues during the course of your testimony, I would appreciate that. I look forward to the testimony from our distinguished witnesses.

I yield back the balance of my time.

Mr. TORRICELLI. Thank you, Mr. Smith.

Ambassador Skol, Ambassador Gelbard, Ms. Roseborough, this is the hearing that never should have happened. It was never our intention to have the same subject come before this committee on another occasion to discuss a subject that was already discussed at length. The members of this committee felt we had a commitment from the administration to resolve this problem. It is not resolved.

In all of my time in Congress I can recall no issue which across party lines, uniting peoples of all political philosophies, should have come to such a logical conclusion. Nevertheless, the problem not having been solved, despite assurances to the contrary, we bring you back to discuss this further and hope to come to some resolve.

We will, of course, receive any of your prepared statements. We would ask you to summarize them as you see fit, hoping that since each of us know our respective positions and much of the background, much of what needs to be done here is of course the questions and answers. We hope will you reserve the balance of the time accordingly.

Ambassador Skol.

STATEMENT OF AMBASSADOR MICHAEL M. SKOL, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INTER-AMERICAN AFFAIRS, DEPARTMENT OF STATE

Mr. SKOL. Thank you, Mr. Chairman.

I am delighted to be here and I believe this hearing is very useful for a number of reasons. Let me paint a more general picture, and Robert Gelbard will go on to talk more specifically about the drug issue. In painting any general picture, drugs remain the most important single issue in our relations with Colombia, as Chairman Lantos said. We are the biggest consumer of cocaine. Colombia is the biggest producer. Without an active policy on the part of both governments, there is no antidrug policy in the Western Hemisphere.

Let me begin with the recent past and with the present. We have had a strong, powerful relationship across the board with the administration of President Cesar Gaviria—on drugs and all other issues. Recently, as has been pointed out, we have had some very angry, unfortunate moments—the result of things we have done, the things Colombia has done, and more importantly, allegations of what each of us has done.

Cesar Gaviria, who finishes his term as President this coming Sunday, has exhibited, continues to exhibit, a level of courage, of determination, of cooperation with us, of success in antidrugs and other issues that is very nearly unparalleled anywhere. It was a reflection of what Cesar Gaviria did, his successful combat with the Medellin cartel—the most dramatic of all of this—that led the U.S. Government to make a rare exception to its rule of not supporting specific candidates for office in regional bodies.

We strongly supported the candidacy of Cesar Gaviria to be the Secretary General of the Organization of American States. He will be inaugurated on the 15th of September here in Washington. And I would emphasize that we would never have made such a decision had it not been a reflection of admiration for Cesar Gaviria, the way he has been running Colombia, the way he has been running the antidrug policy in cooperation with the United States.

In a word, what we need now is a continuity of what Cesar Gaviria has begun with the United States and with Colombia itself in drugs. There are other issues. There are human rights issues. Human rights are being violated on a daily basis in Colombia.

There is a willingness on the part of—a commitment on the part of the incoming administration—to deal with these issues. And it is a basic American interest in Colombia to see that these issues are in fact dealt with.

TRADE

Colombia is an advanced country in terms of economic reform. We see Colombia in our future in terms of increased trade, in terms of investment. We have a deep interest there.

DEMOCRACY

The continuity of democracy. Reform of the judiciary. These are some of the issues we see as basic to the American interest in that country.

Now we are undergoing a transition to the administration of the President-Elect, Ernesto Samper. And we all know there have been doubts raised. There have been accusations, allegations, along with a number of other issues that have arisen, including the "force-down" issue to which all three of you have referred. We descended over the past several weeks into what can be described as a very unhappy moment in the relationship, not only with President-elect Samper, but with Colombia as a whole.

Our view is that whatever in fact happened during the election campaign, the most important focus for our administration, for Colombia, for President-elect Samper and his team, is what happens in the future, that is, what begins to happen on his inauguration this coming Sunday.

We are looking for a pragmatic solution to a terribly complicated, difficult and angry problem. Ambassador Chris Arcos, Ambassador Gelbard's deputy in the State Department, and I visited with President Samper in New York some weeks ago. We talked with him and two of his ministers. We talked frankly about what we will all be looking for, what the Congress of the United States and the Congress of Colombia will be looking for—and that is action, aggressiveness. Doing something about the Cali cartel.

President-elect Samper gave to us at that time an outline of what I would call his battle plan against the cartels. It is very nearly the same as what he put into a letter to several Members of the Congress. We can go into details later about the specific proposals that he made.

In our view, it is a good battle plan. It makes sense. It could work. And as President-elect Samper himself indicated in the letter, it will only work if his government, his administration, is serious about pursuing it, and it will only work if the United States is serious about pursuing it with him.

We had another round last week of the same kind of discussions, much more in detail, with three ministers—designate of President-elect Samper. Ministers—designate of justice, defense and foreign relations. Once again, we talked battle plan. We talked actions. We talked what we would do. We made promises to each other.

Ambassador Myles Frechette, newly arrived in Bogota, is undertaking the same kinds of conversation with the incoming administration. Our hope basically, our belief, our commitment, and it must be the Colombian commitment too, and that is what we have been told, is that we can duplicate and improve on the level of cooperation that we have had with the administration of President Gaviria. And we will do everything in our power to make that come to pass.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Skol appears in the appendix.]

Mr. TORRICELLI. Thank you.

Ambassador Gelbard, welcome back.

Mr. LANTOS. You should be under oath before you make a statement like that.

STATEMENT OF AMBASSADOR ROBERT S. GELBARD, ASSISTANT SECRETARY FOR INTERNATIONAL NARCOTICS MATTERS, DEPARTMENT OF STATE

Mr. GELBARD. I appreciate the opportunity to appear before you today.

As your letter of invitation suggests, our relationship with Colombia has undergone several rocky weeks. It is a vital bilateral relationship. From my own narcotics perspective, there is none more important anywhere.

Mike Skol and I hope to place that relationship in some perspective, explain how we got where we are today, and offer our thinking on where we are headed.

I have a formal statement, Mr. Chairman, which, if you agree, I will submit for the record.

Mr. TORRICELLI. Without objection, it will be entered in the record in full.

Mr. GELBARD. Thank you.

I last appeared before the two subcommittees 5 weeks ago. At that time your attention and mine was focused on the issue of the suspension of radar intelligence to Colombia and Peru. I was optimistic that we had finally resolved the issue since the President's decision solved a difficult policy problem that we have wrestled with for months.

Congress showed every sign of willingness to resolve the criminal liability problem as soon as possible. I myself was hopeful that we could resume cooperation with Colombia and Peru soon through some interim agreements. Five weeks later, as you have stated, I regret that this issue is still not yet behind us.

To be fair, Congress is trying to do its part by moving on the President's requested amendment to the criminal code that will permit us to resume cooperation without risk of prosecution. And we hope the necessary bill will be on the President's desk for signature before the August recess.

But despite near assurances from the Colombian and Peruvian Governments in my early conversations with Bogota and Lima, they have apparently elected not to pursue interim agreements and to wait instead for us to resolve our domestic law concern. I regret this because this continued suspension hurts us all.

It is all the more important, of course, that we pass the administration's proposed amendment as soon as possible. The amendment is important because Colombia is important. It is key to U.S. counternarcotics efforts in South America, in the Western Hemisphere, and in the world.

More Americans die from cocaine every year than any other illicit drug, and the overwhelming majority of all cocaine entering the United States is processed through Colombia by a few Colombian trafficking cartels.

For 5 years, we have been fortunate. Under the leadership of President Gaviria, we have enjoyed the best counternarcotics cooperation of any two governments anywhere. Whether interdiction, investigation, prosecution or eradication, we worked hand in hand with the Gaviria administration.

And the cooperation did not come to Colombia free of cost. The families of more than 2,000 assassinated police officers can tell us something of the price of counternarcotics in Colombia.

This coming Sunday, Ernesto Samper is inaugurated as President of Colombia. We look forward to, indeed, we need, at least the same close cooperation with him as we enjoyed with Gaviria.

We are ready to do our part. I will not revisit the press stories, the leaks and accusations reported over the past month. They trivialize the seriousness of the job ahead of us. Suffice it to say that from a counternarcotics perspective we are pleased now with President-elect Samper's early senior appointments and we applaud his public statements emphasizing his commitment against drugs.

Mr. Chairman, our relationship with the Samper government begins this Sunday. We hope for an aggressive effort against narcotics and we are ready to do our part. It is only fair that our two governments should clearly lay out our mutual goals and expectations in meeting the narcotics threat. We have already done so,

mostly last week with the three ministers designate selected by President-elect Samper.

I would like to share some of our most important expectations with you today, which should not come as a surprise.

We hope to work with qualified officials committed to a serious effort against narcotics traffickers. We expect serious efforts against the Cali cartel and its senior leaders, including arrest and incarceration. If the current text of the Colombian criminal code allows vicious traffickers to serve only token sentences or walk free, then we hope the government will seek changes in the law just as we seek to change our domestic law to permit cooperation with Colombian narcotics interdiction.

We expect serious efforts on eradication of coca and opium poppies, money laundering, controlling precursor chemicals and interdiction. Our message is quite simple. Colombia and the United States share a common adversary. This adversary attacks the national security of us both. It is in our mutual interest to work together. And if Colombia does its part so will we.

I will close by reminding us all of an obvious fact. Counternarcotics cooperation with Colombia is not just an executive branch issue. In June, Chairman Lantos chastised us for failing to consult earlier with Congress on an important legal and policy matter.

Mr. Chairman, I am consulting with you now, and we need your help. This is a sensitive time in U.S.-Colombia relations. Carefully drafted and debated legislation can be helpful. Excessive legislation that undercuts our very cooperation with the Colombian Government is not.

In that regard, I appreciate the efforts of the House last week to remove some unrealistic provisions from the Foreign Operations Appropriations bill. Counternarcotics cooperation must be a two-way street.

We have repeatedly told President-elect Samper we will support his efforts against narcotics. If he takes the pledge, we must be prepared to deliver. We must fund programs with proven track records. We must be careful about attaching conditions to our programs that undercut their very objectives.

U.S.-Colombian relations have reached an historic cross road. It is important we take the right turn and that we walk down the same road together.

I appreciate the support of this committee and I look forward to working together in the future.

Thank you.

[The prepared statement of Mr. Gelbard appears in the appendix.]

Mr. TORRICELLI. Thank you.

Ms. Roseborough, I understand you do not have a statement but were anticipating answering questions?

Ms. ROSEBOROUGH. That is correct.

Mr. TORRICELLI. Let me begin by simply noting that as a Member of Congress I have witnessed many bilateral disputes between the U.S. Government and foreign nations. Never do I remember an instance in which I believed that the United States was so dis-

proportionately responsible for a problem in relations and so wrong as a matter of policy.

It is being argued that 18 U.S. Code Section 32(b) prohibits the U.S. Government from sharing radar information that would help foreign governments in the interdiction of airborne cocaine en route to the United States.

The legislative history of the statute indicates that it was the intention of the Congress to establish a basis for prosecuting terrorists that might take action against unarmed civilian aircraft. And yet, in one of the great examples of legal acrobatics of our time, the statute that is now being argued prohibits the U.S. Government from sharing radar information from aircraft and land-based systems with foreign governments.

Although the United States would only share the information; foreign governments would reach their own independent judgments of what actions to take; although it is clearly in the security interest of the United States for the protection of our citizens to share this information; while it is clearly the undisputed policy of the U.S. Government not to shoot down aircraft, it is other sovereign governments who would make this judgment independently.

Have I, Ms. Roseborough, in any instance misstated the legislative history of the statute or the facts as you see them?

Ms. ROSEBOROUGH. First let me make clear that 18 U.S.C. 32(b) does not interfere with the efforts of the United States to provide aid to Colombia and Peru in their interdiction efforts. We have been doing so for years, and I understand that Colombia and Peru have been able to make use of the information we have provided to them in their successful efforts to interdict drugs.

What is new in this scenario is the decision of the Governments of Colombia and Peru to shoot down, to use deadly force against civilian aircraft. And the decision that the assistance that we were providing to them was now going to be used not only in their traditional interdiction efforts, but in this new program in a substantial and material way to assist in the shooting down of these aircraft.

Again, the question became for us whether 18 U.S.C. 32(b) applied to foreign governments and whether it prohibited those foreign governments from shooting down civilian aircraft.

Mr. TORRICELLI. Is it the policy of the U.S. Government to shoot down civilian aircraft?

Ms. ROSEBOROUGH. It is not the policy of the United States, and 18 U.S.C. 32(b) in fact reflects that it is not the policy of the United States.

Mr. TORRICELLI. In providing this information, have we formally entered into a relationship with the Colombian or Peruvian Government to assist them in shooting down aircraft and directly participate in the shooting down of that aircraft?

Ms. ROSEBOROUGH. The question that was posed to us was whether if we provided information that substantially and materially aided the Governments of Colombia and Peru in shooting down civilian aircraft, whether the U.S. Government personnel who provided that——

Mr. TORRICELLI. We know that is your legal judgment. Now we are dealing with the facts.

I am unaware, having visited the radar sites and met with military personnel and the officials of each government, that the U.S. Government is directly participating in any program to shoot down civilian aircraft. My knowledge of the program is that we give radar information to the Colombians and Peruvians who make their own judgments and undertake their own action.

Are you aware of any formal relationship in which we are part of a program to shoot down aircraft in these countries?

Ms. ROSEBOROUGH. I do not myself have personal knowledge of the facts. I was informed at the time that we were asked for our legal opinion that the circumstance that we were to evaluate was to assume that the information that we were providing to those governments could be used in a substantial and material way——

Mr. TORRICELLI. When did Peru and Colombia begin these actions?

Ms. ROSEBOROUGH. I have to defer to the State Department for an answer to that question. I don't know the answer to that question.

Mr. TORRICELLI. Ambassador Gelbard, when did the Peruvian or Colombian effort for air interdiction begin?

Mr. GELBARD. I believe that the Peruvian Government changed its policy to begin shooting down aircraft, or a policy of willingness to shoot at or shoot down aircraft something over a year ago, and the Colombian Government changed its policy to do so late last year, implemented early this year.

Mr. TORRICELLI. Indeed, I was in Peru in 1992, and they were beginning their program for air interdiction.

Ms. Roseborough, this judgment was reached in 1992, 2 years preceding your legal judgment. Are you aware of any U.S. attorney who was beginning prosecution against a U.S. Government official because we participated in the shooting down of civilian aircraft?

Ms. ROSEBOROUGH. I am not.

Mr. TORRICELLI. Are you aware of any U.S. Government official who was in any way under threat of prosecution by a foreign government?

Ms. ROSEBOROUGH. I am not.

Mr. TORRICELLI. Was there some issue present here that posed a difficulty for a U.S. Government official in threat of their own liability from somewhere, some government, of which we should be made aware?

Ms. ROSEBOROUGH. I am not aware that anyone was acting despite a specific threat of persecution or prosecution from any source.

Mr. TORRICELLI. I suspect there is no one in the Justice Department who even on a theoretical basis could find a single U.S. attorney or indeed invent a scenario where a grand jury, empaneled by the Justice Department, could conceivably be seeking to indict an official of the Department of Defense for participating and giving radar information to an allied country for narcotics interdiction.

Therefore, what we are dealing with here, in my judgment, is a case where lawyers in the Justice Department, largely to justify their own existence, have invented a legal difficulty which, in practicality, does not exist.

Now, getting to the statute, is it your judgment that 18 U.S.C. 32(b) would prohibit, if indeed the U.S. Government were involved in shooting down civilian aircraft, which in my judgment it is not, but for the sake of argument I will cede you the point, is it your argument that the U.S. Government would be precluded under any circumstances from providing radar information to any component of the U.S. Government or allied nations that would result in the shootdown of an aircraft?

Ms. ROSEBOROUGH. The answer to your general statement is no. But if information provided by the United States was used to our knowledge by a foreign country in a way that substantially and materially assisted them in shooting down a civilian aircraft in circumstances other than self-defense, that would be a violation of 18 U.S.C. 32(b) as it is presently written and possibly in the aider and abetter statutes. And that is why the administration has proposed an amendment to that statute so——

Mr. TORRICELLI. This would only prohibit us from helping a foreign government. So if this information were provided to an agency of the U.S. Governments, it would be permissible?

Ms. ROSEBOROUGH. No.

Mr. TORRICELLI. So in any circumstances we could not provide information to our own government or a foreign government that resulted in the shooting down of a civilian aircraft?

Ms. ROSEBOROUGH. It is overbroad to say "in any circumstance." The fact is that the circumstances that matter are whether it is civilian or military, whether it is self-defense, and whether it takes place under a state of ongoing hostilities. Those are the factors that matter.

Mr. TORRICELLI. So, for example, the United States being at peace with the world, a civilian aircraft of unknown origin without markings that refused communications, that was flying over a sensitive military site or nuclear testing area or an area of missile deployment for the United States, are we entitled to shoot the plane down?

Ms. ROSEBOROUGH. If it is a civilian aircraft, 18 U.S.C. 32(b) at present would make criminal the shooting down of that aircraft.

Mr. TORRICELLI. This is rather extraordinary testimony. I want you to think about this carefully. It is the testimony of the administration that if a plane of unknown origin flies over a sensitive military facility of the U.S. military, the Justice Department would recommend prosecuting a Department of Defense person who ordered it to be shot down?

Ms. ROSEBOROUGH. If the Department of Defense personnel acted in self-defense or because they perceived that the aircraft represented a substantial danger to lives in the air or on the ground, that would be an exception.

Mr. TORRICELLI. You would shoot down in that instance. And presumably if an unmarked aircraft were flying over the White House in a threatening mode, you would say that could be shot down?

Ms. ROSEBOROUGH. If the aircraft were posing a present threat, yes, it could be shot down in self-defense.

Mr. TORRICELLI. Continue with my logic here for a moment. You have conceded that it is a permissible action to shoot down an air-

craft flying over a sensitive U.S. military facility. You have ceded the point it would be permissible to shoot down an aircraft flying over the White House if it appeared to represent a threat to the President of the United States.

But, simply giving radar information to the Colombian Government, which results in their sovereign government making an independent judgment, potentially, to shoot down an aircraft, involved in transportation of cocaine to the United States, recognizing the thousands of Americans who lose their lives from that cocaine, and that your failure to allow that policy now to continue has resulted in a 20 percent increase in cocaine shipments to the United States, and that that program in the previous year resulted in disclosing the locations of 101 cocaine airfields for transportation to the United States and 555 illegal cocaine flights, it would still be your testimony that that is not of a sufficient threat to the United States that we would be permitted to give that information to the Colombian Government?

Ms. ROSEBOROUGH. It is precisely because the administration feels that the balance of harms here is in favor of allowing the flow of information and other assistance to Colombia and Peru in their interdiction programs that the administration has proposed an amendment to 18 U.S.C. 32(b) to allow for governments like Colombia and Peru to use deadly force in their interdiction programs and for us to provide them assistance despite our knowledge that one of the elements of that program would be——

Mr. TORRICELLI. Allow me to summarize. The testimony you have now provided for us is that prohibiting flights over sensitive military areas or protecting the life of the President of the United States is important for the security of this country. Providing the identical information for the interdiction of cocaine flights is not, recognizing that the latter apparently is not in the national security interests of the United States.

You have further testified that you know of no U.S. attorney or other component of the Justice Department that was at any time contemplating in the preceding 2 years the prosecution of any U.S. Government official who was involved in sharing this information, and yet you interrupted the sharing of information, and have caused the program to cease, further establishing a rapid and precipitous increase in cocaine shipments into the United States as a result.

I have also challenged you, and I will certainly cede you the time if you would like to answer, anything in the legislative history which I read with the congressional intent being the establishment of a legal foundation for prosecuting terrorists involved in the destruction of scheduled civilian airliners, to now result, in your legal interpretation, the prosecution of U.S. Government officials for their efforts and introduction of nonscheduled civil aircraft and narcotrafficking.

Would you like to address again the legislative history to establish the error of my thinking?

Ms. ROSEBOROUGH. Let me first emphasize the conclusion reached by the Justice Department in this instance was first the conclusion of an interagency working group that included lawyers from the Department of Defense, the Joint Chiefs of Staff, the

State Department, the Department of Transportation, the Department of Treasury, the Coast Guard, and the Federal Aviation Administration. This was not the lone thinking of the Justice Department on this issue.

Each of these agencies concluded after careful study and review that 18 U.S.C. 32(b), because of its text, its structure, and its legislative history, prohibit foreign governments, any government, from shooting down a civilian aircraft, except in circumstances that can be fairly characterized as self-defense. That is it. That is the breadth of the statute. That is what Congress has prohibited.

It is our job, it is our responsibility as employees of this government to comply with the laws of the Congress that apply to the government acting officially. 18 U.S.C. 32(b) is——

Mr. TORRICELLI. I voted for that legislation. My colleagues voted for that legislation. I would challenge you to find 1 of 535 Members of Congress who voted for this legislation who share your interpretation, or indeed anything in the Congressional Record from the extensive debate and discussion of that legislation in any committee that supports that interpretation.

And if it is intended to make me feel better that this is not simply the judgment of the Justice Department but other departments of the Federal Government as well, I can assure you, as a result of that analysis, I only feel worse.

This is an extraordinary set of circumstances that is worthy of freshman classes in law school to witness how legislative history can be ignored and the point of the absurd can evolve from any discussion of the law and its misapplication.

Mr. Lantos.

Mr. GELBARD. Excuse me, if I may.

Mr. TORRICELLI. Yes, Ambassador.

Mr. GELBARD. While I am reluctant to enter into this dialogue——

Mr. TORRICELLI. I would be.

Mr. GELBARD. I can't resist, Mr. Chairman. I am not a lawyer, but I would like to point out that it is noteworthy that as we have pursued this and as we have—as the President has decided to seek this amendment, I would just like to note that it has not been as easy a point with everyone on one side as one might think.

I have received letters from the president of the AFL–CIO, the Airline Pilots Association, the Air Transport Association, the Association of Private Aircraft Owners and two other civil aviation organizations all strongly opposing our desire to seek an amendment to 18 U.S. Code 32, and arguing fervently that 18 U.S. Code 32 does prohibit our assistance.

Mr. TORRICELLI. Ambassador, I am not at all surprised that different organizations are defending the potential interests of their membership. I understand it and I respect it and they should want an interpretation of the statute that is clearly designed against narcotraffickers and does not increase any threat to their own memberships.

My concern is that well-intentioned people have apparently weighed the threat to life of the pilots of narco-trafficking aircraft. The theoretical liability of Department of Defense personnel, and the interests of American citizens who are losing their streets to

trafficking in narcotics, losing their lives to the threats and the robberies that are sustaining those drug habits, and they are the most underrepresented of all.

We were assured that this absurd set of circumstances was going to be resolved. We have proceeded with legislation to do so. Legislation takes weeks and months. In the interim time, it is a reality, it is not a theoretical problem, that flights have increased, and there is more cocaine in the streets of American cities as a result.

That is a reality. And somebody needs to defend those individuals as well.

Mr. GELBARD. With all due respect, Mr. Chairman, I think I am extremely familiar with all aspects of the drug problem and have been for a number of years, in a variety of previous positions as well as my current one, including as Ambassador to Bolivia. But looking at the totality of the programs in which we are engaged, our economic, military and other assistance to these countries have been dramatically slashed. That is also having a similar effect.

The conditions which have been put on our military assistance significantly limiting it have had a significant negative effect. When I testified 5 weeks ago I talked about the $70 million that we would hope to use to support eradication programs in Peru which have been frozen over the last several years in the Congress. They are still frozen.

I note, Congressman Smith, that you mentioned that President Fujimori was incredulous. I am incredulous he didn't talk about his inability and unwillingness to pursue eradication efforts. Part of that is because we haven't been able to disburse the funds that we would like to make available to Peru, to Bolivia and to other countries.

There is a totality of these programs that needs to be looked at all together. The administration agrees quite strongly with what you have said. It was the opinion of our lawyers that we needed to seek legal relief. We hope that since the Department of Defense authorization bill is currently in conference, that this will be approved very shortly.

We have made efforts to try to get interim assurances. We were going to get an interim agreement with these two countries. We were not able to get such agreements because those countries did not wish to give us, did not wish to reach agreements with us.

But we certainly agree that what we need is a much greater overall attack against this problem in conjunction with our partners.

Mr. TORRICELLI. Ambassador Gelbard, I think you know there isn't a member of this committee who would argue with your contention that we should be more aggressive in each of those aspects of our drug interdiction program. But I assume it is not your testimony that simply because the administration has been frustrated in some aspects of its drug interdiction program, we should be abandoning the one part of it that was working, because indeed that is exactly what has occurred.

I understand you would like to see more things happening. This part of it was working until it was stopped. In any case, there isn't a member of this committee who has not been a part of trying to help secure assistance for each of those aspects of the program.

And let me finally just conclude to you that one alternative, when you receive this legal analysis, was to proceed with the change of statute. There was a second. Any lawyer who provided you this absurd interpretation of congressional action, you should have been seeking new lawyers. It is an absurd interpretation of the law.

Mr. Lantos.

Mr. LANTOS. Thank you, Mr. Chairman. I would prefer to begin my questioning after we cast our vote.

Mr. TORRICELLI. That is fine. Mr. Smith, the same?

Mr. SMITH. Yes.

Mr. TORRICELLI. We will adjourn briefly and return promptly.

[Recess.]

Mr. LANTOS [presiding]. The subcommittees will resume.

Before I come to my questions, let me commend you, Ms. Roseborough, for holding your ground so successfully and effectively in the face of very vigorous questioning. You have done a very good job.

Ms. ROSEBOROUGH. Thank you.

Mr. LANTOS. Let me also ask, is the legal opinion that we have been discussing your legal opinion, or was it the product of others in the department, in addition to legal staffs of other agencies?

Ms. ROSEBOROUGH. Just to make sure I am clear on which opinion you are referring to, the opinion that has been made publicly available is the opinion of the Justice Department.

Mr. LANTOS. Let me commend you that as a good soldier, you tried to defend an opinion that many of us here find absurd. As we find the referral to lawyers issues which are fundamentally issues of foreign policy and national security. The tendency of some bureaucrats, all three of you excluded, when confronted with the choice of defending their bureaucracy or defending civilization, is an easy one. They invariably defend the bureaucracy and not civilization.

And this clearly is one of those examples where, against a hypothetical threat, we are protecting members of the U.S. military, disregarding the mind-boggling havoc, anguish, and tragedy that the continued importation of drugs creates in the United States. There is a discontinuity here which is profoundly disturbing.

In a totally different context, a few days ago Secretary Christopher testified before us, and I asked him to reconcile a similar discontinuity in U.S. foreign policy with respect to the question of possible risks entailed in certain operations: Rwanda, Bosnia, Somalia, what have you. Here is a country which apparently accepts with equanimity the unnecessary death of hundreds of thousands of American citizens through smoking, drinking, drug use, automobile accidents, criminal violence in our streets and in our homes—hundreds of thousands of Americans die as a result of these actions.

But the concept that as the only remaining superpower we agonize over participation in those situations because we may sustain a handful of losses on the part of our uniformed military, every one of whom is a volunteer, is a discontinuity and an absurdity which, to the rationale mind, is as incomprehensible as the legal opinion we have been discussing.

I would like to go beyond the immediate question and basically raise two issues. My understanding is that Colombia is interested in being included in any expansion of NAFTA. I wonder if, Ambassador Skol, you could comment on that.

Mr. SKOL. Mr. Chairman, Colombia certainly has expressed a strong interest in a free trade agreement with the United States, as have a number of other countries around the hemisphere. And the factual situation about economic reform, change, modernization in Colombia, particularly under Cesar Gaviria, would certainly qualify Colombia as one of the leading countries in the hemisphere that would be able to benefit from free trade. And the United States would be able to benefit from free trade with Colombia.

The issue, of course, of how fast we go. Under what circumstances there will be a stand-alone free trade agreement or accession to NAFTA has not been decided yet. But certainly Colombia is interested.

Mr. LANTOS. Let me just offer a word of caution, because whatever Colombia's qualifications may be in terms of economic development and other relevant criteria, until and unless there is a dramatically more effective effort by the Government of Colombia to deal with the Cali cartel and the whole issue of drugs, there isn't a snowball's chance in hell that this body would even consider discussing the issue of NAFTA accession. And I would be grateful if at the appropriate level you would convey this.

Mr. SKOL. Mr. Chairman, with pleasure I will convey that, but I can also tell you that the administration agrees with what you are saying. Narcotics cooperation, an effective narcotics program is at the cornerstone, the heart of our relationship with Colombia. And the administration would have no interest in making any snowballs to see whether they would survive in hell under circumstances other than those which you outlined.

Mr. LANTOS. A few days ago I received a letter, I believe some other colleagues may have received a similar letter, from the President-elect of Colombia. It is a remarkable letter. Without objection, I would request that it be included in the record at this point.

Mr. TORRICELLI [presiding]. Without objection.

[The information appears in the appendix.]

Mr. LANTOS. I would like to raise some points in this letter. And I will invite both Ambassador Gelbard's and Ms. Roseborough's and your comments on that, because this letter is either one of the most cleverly written public relations documents I have seen in a long time, or it is a ray of very significant hope for very constructive developments, both within Colombia and in our relations with Colombia.

After the President talks about our common struggle against drug trafficking, he establishes his own bona fides in this field by saying, "I know in a very personal way the kind of threat drug traffickers represent to our democracies. The four bullets still lodged in my body are a constant reminder of the 1989 cartel attempt to assassinate me at Bogota International Airport. I was lucky, unlike many of my compatriots who have fallen victim to the brutal violence the cartels have wreaked in my country.

"Once again," he goes on to say, "we are the target of their diabolic machinations. The taping of a telephone conversation between

a cartel leader and a journalist revealed their frustrated efforts to infiltrate the campaign organizations of Colombian Presidential candidates. I was perfectly aware of this threat when I entered the Presidential race. That is why I established an independent moral ombudsman in my campaign. That is why my campaign books and records have always been open to public scrutiny. I also expelled several sympathizers when it became evident that they were not up to our rigid ethical standards. We rejected several contributions because of their unclear or obscure origin. That is why I am completely confident that my campaign was successful in rejecting drug traffickers' undercover efforts to spread their corrupting influence."

This has been an issue much discussed in our media. I would like you, Ambassador Skol, to state for the record the official government position on what our judgment is concerning these charges and allegations.

Mr. SKOL. Mr. Chairman, we have reached no definitive judgment on what exactly happened during the electoral campaign. We know and we have reached a judgment that the cartels tried to bribe their way into the campaigns. Whether they did or not——

Mr. LANTOS. Both campaigns?

Mr. SKOL. Yes, sir. Whether they did or not, we cannot reach a conclusion. However, given the tapes, the transcripts of many of which have been released, and given other allegations, it is a logical human response and it is a good human response of the Government of the United States to question, to be concerned about these allegations.

It is our firm conclusion that the only way to test the allegations begins this Sunday when President Samper is inaugurated—to see just what kind of commitments, what kind of actions, what kind of policies his regime enacts and implements in the drug area.

That is the proof of the "flan," as could be said in a country like Colombia. It is the way it has to happen. That is our conclusion. What physically happened during the campaign—we have not reached a definitive conclusion.

Mr. LANTOS. Do you expect to reach a definitive conclusion sometime in the future?

Mr. SKOL. I simply cannot answer that, Mr. Chairman.

Mr. LANTOS. What efforts are under way on the part of our Government to try to reach a definitive conclusion?

Mr. SKOL. The Government of Colombia itself is investigating. President-elect Samper has called for an investigation. We continue to look into our own records and various sources.

I just simply do not know whether the normal methods, even the extraordinary methods that are often used to find out what has happened in the past will produce the kind of evidence which will enable us to reach a definitive conclusion. And that is why, again, our focus, our interest, is overwhelmingly on what physically actually happens after this Sunday in Colombia.

Mr. LANTOS. Ambassador Gelbard, do you have anything to add?

Mr. GELBARD. Clearly, Mr. Chairman, there were numerous attempts, numerous accusations, and considerable reports of—and charges of campaign contributions that were made by the Cali cartel and others. And incidentally, it is not just the two principal candidates, but a third candidate too. The totality of the evidence or

the reports that have come out concerning the involvement of drug traffickers in the campaign would cause one to think that there was a certain amount of credence to the reports.

Samper has very strongly, vigorously denied any knowledge, any awareness of any such acceptance of any funds from traffickers. In fact, as you read in his letter, he was referring to one instance of people in his campaign who were removed because there was credible belief that they had taken trafficker funds.

The fact remains that there are enough reports out there to really cause some serious concern. As Ambassador Skol said, when he and Chris Arcos met with President-elect Samper a few weeks ago, they discussed this issue in some detail. There was a commitment from Samper that a thorough and objective investigation would be conducted.

We would certainly hope that this would be an independent investigation. And under the Colombian judicial system, the prosecutor general in fact is independent of the executive branch and is actually part of the judiciary, and in fact, happily, there is a new prosecutor general in Colombia.

But also, as Ambassador Skol says, and as I said earlier, we feel that it is essential to maintain and to establish with the new government the strongest possible counternarcotics program. We have had very serious, thorough, and I have to say good conversations with the three ministers designate last week when they were here.

We want to see them follow through on the commitments. I had one follow-up conversation just yesterday with the minister designate of defense. We hope—and expect—that we will be able to develop even better cooperation now that there is a new prosecutor general replacing Gustavo de Greiff. And that is where the proof will be.

Mr. LANTOS. Ms. Roseborough, do you have anything to add?

Ms. ROSEBOROUGH. No, thank you.

Mr. LANTOS. I fully agree with the two of you that the proof of the flan—and if you were in Spain you would say the proof of the flan flan—is in the eating. And we look forward to that.

So let me just conclude with one question. In this letter of the President-elect, he makes a very strong, powerful, flat, unequivocal statement. Let me read it to you. This is in the context of what the Colombians are going to do.

"We will continue doing what we have done successfully, vigorously applying all our law enforcement resources to investigate, track, and put in jail the drug lords and their accomplices."

Now comes the key sentence. "We know who the bosses of the Cali cartel are, and we will capture them."

This is not Napoleon's campaign in Russia with all its uncertainties. This is not the Second World War. This is not even the Peloponnesian Wars. This is a relatively simple operation against a finite number of individuals.

The President-elect claims he knows who they are. He knows where they are. And he will capture them.

Taking your very wise comment that the proof of the flan is in the eating, what timeframe do you think it is reasonable for the President-elect of Colombia to live up to this promise?

Mr. SKOL. A most difficult question, Mr. Chairman.

Mr. LANTOS. Well, it is a very simple question, and I really expect a straight answer from both of you. We are not dealing with complex, difficult things, such as at what point will we reach 100 percent coverage of all American citizens with medical care. That is a more complex issue. Or at what point will we eradicate violence in American cities.

The President-elect of Colombia says he knows who these people are, and I quote again, "We know who the bosses of the Cali cartel are, and we will capture them."

Give me the timeframe.

Mr. SKOL. Mr. Chairman, he goes on to say in that same paragraph, "We will need the continuous help of the United States and technical support, training, intelligence, and exchange of evidence to attain this goal."

Mr. LANTOS. Assuming that that is forthcoming.

Mr. SKOL. Assuming that that is forthcoming. How long did it take to capture Escobar? It was 18 months. If that is a fair standard, perhaps that is a fair standard in Colombia, but I really cannot give you a timeframe for what is—I think the Colombians would tell you that it is somewhat more complicated and difficult and dangerous than you have indicated.

But you are absolutely right to cite this one sentence in President-elect Samper's letter. We were delighted to see it and we will want to provide, with Congress' support technical support, training, intelligence, and exchange of evidence to attain this goal.

Mr. LANTOS. In my letter congratulating the President-elect, I asked him to respond to me with a specific date as to when this felicitous event will take place. And I will hold him to it.

Thank you very much, Mr. Chairman.

Mr. TORRICELLI. Mr. Smith.

Mr. SMITH. Thank you very much, Mr. Chairman. This is a very enlightening hearing and it continues to be a very disturbing one.

Ambassador Gelbard, earlier you noted that Congress had improved conditions on assistance to Peru for the purpose of counternarcotics. Having just been in Peru and spoken with many of our key personnel in our embassy, as well as with top people in the Peruvian Government, you raise an issue which they raised as well. You suggested the release of those funds for alternative purposes. It is my understanding that some of it is conditions extend back to fiscal year 1991.

What are the administration's plans to notify Congress about the release of those funds, as well as subsequent funding for alternative development in Peru?

Mr. GELBARD. We would intend to use those funds for projects to support the new integrated drug strategy which the Fujimori government has put together, for a combination of sustainable development and alternative development programs for use in direct crop substitution, infrastructure development, and also projects to draw individuals who went into the coca-growing areas back to the areas they came from and to prevent people—to encourage people not to leave those zones.

Additionally, we intend to try to use those funds to leverage funding from other bilateral and multilateral sources.

Within the last 2 weeks, I have been working extensively and reached agreement with the World Bank, to begin for the first time to provide significant funding, they have said, for alternative development programs in Peru and Bolivia. We hope we would be able to combine our efforts in both those countries with the World Bank and U.S. Government bilateral funds.

Mr. SMITH. Can you tell our subcommittees when the congressional notification will be submitted for the use of those funds? It seems to me the ball is in the administration's court. When will you come and say, this is what we want to do; this is when we want to do it.

Mr. GELBARD. Actually, Mr. Congressman, I may have been in this business too long now, but I was involved back in 1991 trying to release those funds at that time, and we have tried over time, but most recently we have briefed staff of this committee about our plans as recently as last Friday. But we did not conclude, I am told, that briefing with the approval of the committee staff that we should go forward and notify.

Mr. SMITH. Say that last part again, please.

Mr. GELBARD. We did not conclude that briefing, I am told, with the approval of the committee staff that we should go forward and provide the formal notification.

Mr. SMITH. When will the formal notification——

Mr. GELBARD. Well, we would like to reach agreement with the staff that we would get a positive response.

Mr. SMITH. Was the Minority staff briefed on that?

Mr. GELBARD. If that is the case, we would go forward immediately.

Mr. SMITH. It would be my hope that the minority staff would be briefed as well?

Mr. GELBARD. Yes, sir.

Mr. SMITH. Let me ask you about the decision to halt the sharing of information. I have read the interagency memorandum that was compiled by the task force, with regard to the May 1 cutoff of the radar information.

Is this the policy that the administration intended? There is no suggestion that Congress could correct the problem. There did not seem to be an intent to change the current policy, and allow the sharing of that information until there was a bipartisan outcry about the loss of this very valuable tool in interdicting drug traffickers.

Was it intended that the administration would simply implement this policy prohibiting the sharing of intelligence? What were your plans after that decision was made?

To the best of my knowledge, the administration did not come forward and say this is the legislative fix that we want. Only after there was an outcry did the administration try to remedy the situation.

Mr. GELBARD. In fact, as was discussed in the last hearing, Congressman, the decision cutting off the intelligence sharing—the data sharing—was done unilaterally by the Department of Defense on May 1. It was not done on the basis of an interagency decision.

Mr. SMITH. It is my understanding there were interagency consultations.

Mr. GELBARD. No, there were not. Subsequently the Department of Justice's legal opinion came out. But at the same time as it came out, they provided the proposed fix to the law. And then the President approved that fix, and it was sent to Congress.

But that legal opinion which has been so discussed here today and at the previous hearing was subsequent to the unilateral action of the Department of Defense.

Ms. ROSEBOROUGH. Let me just add in fairness that members or attorneys from the Department of Defense were part of an interagency working group that looked briefly at this question before the Department of Defense decided unilaterally to cease assistance.

Mr. SMITH. About how many months were spent on that?

Ms. ROSEBOROUGH. I do not know the answer to that question.

Mr. SMITH. Could you provide that for the record?

[The information follows:]

U.S. DEPARTMENT OF JUSTICE,
Washington, DC, September 29, 1994.

Hon. ROBERT G. TORRICELLI,
U.S. House of Representatives, Washington, DC.

DEAR CONGRESSMAN TORRICELLI: The administration appreciates the opportunity you afforded during the hearing on August 3, 1994 for the Department of Justice to further explain to the House Foreign Affairs subcommittees on the Western Hemisphere and on International Security the Justice Department's legal analysis of the effect of 18 U.S.C. § 32(b).

You asked at the hearing how long the interagency working group that studied this matter had been working before the Department of Defense terminated its intelligence sharing on May 1, 1994. Ms. Roseborough did not know the answer to that question and you asked that the record be perfected at a later date.

The interagency working group referenced in the Department of Justice's legal opinion first met on May 3. This group was convened by the National Security Council after another Interagency Working Group had raised concern about the legality of continuing to provide information to the Andean countries that would be used by those countries to target and shootdown civilian aircraft.

Again, thank you for inviting a representative of the Department of Justice to testify on this important issue and for this opportunity to complete the record.

Sincerely,

SHEILA F. ANTHONY,
Assistant Attorney General.

Mr. GELBARD. In fact, if I just may add, Congressman, I would just like to note that the—that that action to cut the information off was indeed opposed in significant part by others in the government.

Mr. SMITH. Yourself included?

Mr. GELBARD. Yes, sir.

Mr. SKOL. Congressman, if I may add that the feeling of intense frustration about the paradox which you and Chairman Torricelli and Chairman Lantos have outlined has been intense throughout this period.

For the U.S. Government to have spent so much money and effort to help countries like Colombia and Peru reach the point in their own antidrug effort where they could interdict aircraft with our intelligence, and then to tell them that they couldn't have the intelligence because they might use it, is a paradox and a shame and an absurdity, and we therefore have to change the law so that there is no question but that it is legal.

It is the overwhelming policy interest of the U.S. Government and the American people that Colombia and Peru, with our assistance, be able to interdict cocaine trafficking aircraft in the air. That is the policy.

Mr. TORRICELLI. If the gentleman will yield for a moment, indeed it goes to greater matters of personal embarrassment. I led a cadre of members of this committee to Peru and Colombia 2 years ago to urge them to begin air interdictions. We engaged in strenuous debates. There were some fierce arguments.

Over time, we and those in each of those countries were persuasive in convincing those governments to begin air interdictions, only now to be told by our own administration that it was illegal and to cease providing the information.

I suspect that provided no end of entertainment in Lima and Bogota to those who do not wish us well in this obvious contradiction within the U.S. Government.

Thanks for yielding.

Mr. SMITH. Ms. Roseborough, you testified that, to the best of your knowledge, no one has been prosecuted while at least from the administration's perspective, some of our people may have acted illegally in providing this information which may have resulted in a shootdown.

Ms. ROSEBOROUGH. Let me just clarify that. To my knowledge, no U.S. Government personnel have been prosecuted under those statutes.

Mr. SMITH. Why would it not be reasonable to assume that, under prosecutorial discretion, no one would be prosecuted while we pursue this legislative fix?

Ms. ROSEBOROUGH. The fact that a prosecutor might decide not to prosecute a U.S. Government official for certain actions does not justify the deliberate decision of that government official to violate the law.

Mr. SMITH. We are talking about a reading of the law that many of us happen to believe is infirm. But if the actual statutory language, based on your view, is in need of a remedy, that remedy is now making its way through the Congress.

But, Ambassador Gelbard, as you and we all know so well, many snags unrelated to this issue can tie up a conference and the limited calendar remaining before the recess leads me to believe that it is possible, hopefully not probable, but possible that we may be looking to some time in September when the defense bill finally makes its way to the President's desk. That would be several weeks, another month or so of sharing no information, and many flights being given the green light.

Why cannot the administration find some way to remedy the situation administratively? As I indicated before, discretion could be exercised on the prosecutor's side. Or perhaps an interim agreement could have been reached, which I know you have tried but regretfully have not been able to conclude with the Colombians and the Peruvians.

Mr. GELBARD. That was going to be my response, Congressman. We have indeed tried. We thought we had in fact the agreement with those two governments based on visits that I made to the two capitals and meetings I had with the governments of those two

countries, that if we were able to come up with the long-term solution, which is indeed what I do hope will be approved shortly as a result of the DOD authorization bill, then those governments would be willing to accept—to agree to the kind of interim agreements that we discussed during my visit. And I regret that now that has not been the case.

I sincerely hope that the DOD authorization bill is approved with this administration amendment included, because I am afraid, if not, I may have to testify on this subject again.

Mr. TORRICELLI. That is true.

Mr. SMITH. To the best of your knowledge, does the language which is making its way through the conference do the job? Are we going to find, after the bill has been signed, that some other loophole or nuance precludes the sharing of this information?

Ms. ROSEBOROUGH. It is the goal of this administration to allow the information to be shared on a lawful basis with the Governments of Colombia and Peru. We were sharing that information on a lawful basis until the point in time when it became clear to us that those governments intended to use that information to shoot down civilian aircraft, and that they made the decision to change the scope and nature of their interdiction programs.

This was not new information to those countries. In 1990 the Bush administration issued an oral demarche to Colombia when it indicated it might be moving to such an expansion of its interdiction program, that such an expansion might jeopardize the provision of U.S. assistance to their programs.

We believe that the statutory fix that has now been proposed, the bill that is now before the Congress, would allow the U.S. Government to resume the aid that it has previously been providing despite the continuance of Colombia and Peru of shootdown as part of their interdiction programs. Yes, we think the fix is complete.

Mr. SMITH. One final statement and question. It is unfortunate, Ambassador Gelbard and Ambassador Skol, that, having opposed this change which occurred, you have to stand here and take the heat for those who promoted this change which has resulted in this very, very unfortunate situation.

I do have a follow-up question. Suppose the legislative fix does not occur in this session of Congress. Again, this is not beyond the realm of possibility as authorization bills, unlike appropriations bills, are not always absolutely necessary. This is an unlikely scenario in this case, but if it should happen—what would the administration do in that scenario? If we miss the legislative window, we would be talking about many months without sharing this very, very vital information.

Ms. ROSEBOROUGH. In that circumstance, I assume that the State Department would continue its efforts to strike interim agreements with Colombia and Peru to, for the moment, suspend a portion of their interdiction program that would require the direct shootdown of those aircraft so that we can continue to provide the aid until such time as our domestic law allows us to continue to provide it under their expanded programs.

Mr. SMITH. Were there any attorneys who analyzed this and took a contrary view? Contrary to the majority view of the administration, did any of the Justice Department attorneys come to a dif-

ferent conclusion regarding the 1984 act, and suggest it did not apply?

Ms. ROSEBOROUGH. I am not aware of any Justice Department——

Mr. SMITH. So it was a unanimous decision of the Justice Department?

Mr. GELBARD. It was not just the Justice Department. It was the attorneys of some five departments of government.

Mr. SMITH. Thank you. I yield back the balance of my time.

Mr. TORRICELLI. Mr. Menendez.

Mr. MENENDEZ. Thank you, Mr. Chairman.

Mr. Chairman, I apologize to the panel. I was chairing a Committee of the Whole in the House. But I have taken the opportunity to read your testimony. And I wanted to get to this hearing because I have serious concerns.

Before I address those concerns, let me just say that back in my district in New Jersey I have the great pleasure of representing many people of Colombian descent, who work hard, play by the rules, have made enormous contributions to our community and throughout our district. Some of them are my best friends and some are my greatest neighbors. But I am seriously concerned about the allegations Mr. Lantos referred to and Ambassador Skol responded to with reference to the President-elect's alleged receipt of campaign contributions in excess of $3 million from narcotraffickers.

And I want to ask you, Ambassador Gelbard, I see in the testimony you presented that on June 29 you had a meeting with the President-elect in New York, and you referred to that in your testimony. Or was that——

Mr. SKOL. I did, Congressman.

Mr. MENENDEZ. I have this under the statement by Robert Gelbard. It is on page 2 at the top. It says, on June 29, Ambassador Skol and Arcos met—is that not your testimony?

Mr. GELBARD. I said that they met. On June 29 I was actually in Poland.

Mr. MENENDEZ. You were in Poland.

Mr. GELBARD. Yes, sir, with the Director of the FBI.

Mr. MENENDEZ. We have narcotrafficking problems there?

Mr. GELBARD. Actually I am afraid they do.

Mr. MENENDEZ. Well, my question then comes to a press report that is from the *Washington Post* of June 25 where it says, "The Herald quoted two top U.S. officials as saying the administration independently confirmed the charges. It said Robert Gelbard, Chief of the State Department's Office of International Narcotics Matters, confronted Samper, that 8 months ago"—this is now dated June 25, 1994, which means we are talking about November of 1993—"with U.S. intelligence, that Samper received millions of dollars from the cartel."

Is that an accurate account?

Mr. GELBARD. I did meet with President-elect Samper. I believe it was actually in October of last year. And I did discuss with him our concerns that, as I said before you came, Congressman, we had reports that there were drug trafficker campaign contributions being made to the Samper campaign.

And we discussed this in some detail, and we said—I said to him that we believed that these were serious charges and serious reports. As I mentioned earlier in my testimony today, President-elect Samper, at that time candidate Samper, said that he thought there was no way this could be the case. He vigorously denied it.

He said that they had systems built into the campaign which he was certain of, which would prevent such contributions from taking place, and at that time he told me that they had just dismissed two members of his campaign staff for indeed taking trafficker campaign funds.

I told him nevertheless that we were extremely seriously concerned about this. We believed the reports to be credible. And I strongly warned him against this. And as Ambassador Skol and I each said earlier today, we have felt that the totality of the evidence, of the reports that we have received of the involvement of drug traffickers in the campaign, could cause a reasonable person to believe this is the case. There is no smoking gun. And Samper has indeed called for an investigation.

We hope and expect this will be an independent, serious investigation of the entire campaign.

Mr. MENENDEZ. Let me ask you, Ambassador, is this information that you had your conversation with the President-elect Samper about, was it prior to the allegations of the journalist with the tape-recording with the cartel?

Mr. GELBARD. Yes, it was.

Mr. MENENDEZ. So it was not based upon those statements that were publicly made. It was based on other independent evidence?

Mr. GELBARD. Yes, it was, Congressman. But I can't really get into that in this forum.

Mr. MENENDEZ. But without getting into—I won't push you on that for the moment—but without getting into the independent evidence, it was sufficient enough for you to raise these concerns with Mr. Samper; is that correct?

Mr. GELBARD. Yes, Congressman.

Mr. MENENDEZ. You would not have raised those questions purely on some suppositions or you would have had to have significant enough, strong, independent evidence for you to very—in a very diplomatically serious situation—raise such concerns?

Mr. GELBARD. These are issues of such seriousness that I certainly, nor would any other officials, have raised this without serious reason for concern.

Mr. MENENDEZ. Is that part of the concern, the independent information that you received from U.S. intelligence that also—there is another report from the *Los Angeles Times* of July 25 that refers to Major General Dario Octavio Vargas Silva not being received by the Chief of the Drug Enforcement Administration, Thomas Constantine, because they had serious concerns about the Major General believing that he was corrupt. Does that flow from that same information or from other information, do you know?

Mr. GELBARD. I don't think it is appropriate for me to respond for the Drug Enforcement Administration. But as I said in the previous hearing on this subject, I don't think it would be appropriate to discuss information of that nature in an open hearing.

Mr. MENENDEZ. Understanding that, I still haven't asked what you that information is. I have just categorized it as to its seriousness.

My question would be independent—OK, you can't answer for the DEA. Was there information—and this goes to another line of questioning that I have, which is, I share with the Chairman our concern about cooperating with the Colombian Government and having joint efforts. But one shares intelligence when they believe that they are sharing that intelligence with another country who shares common ground, and for which the security of that intelligence can be assured, or to a high degree of probability.

And in that respect, I am concerned about our ability to be sharing security or our desire of sharing information with those sources that we might not believe to be secure.

And in that respect, in your position, and the State Department in this sphere, independently that you can't answer for the DEA, do we have concerns, have we raised concerns about Major General Octavio Vargas Silva?

Mr. GELBARD. Let me just say that I understand why you would feel and I would feel, any of us would, that if we are to have sensitive programs with any country, we have to feel confidence that the people with whom we are dealing are indeed honest, serious, qualified officials. In my oral statement I mentioned the fact that in the discussions we have had with the appointed—some of the appointed cabinet-level officials of the Samper government, we have indeed discussed these types of issues.

In fact, over the last several years, during the Gaviria government, we have had unprecedented cooperation involving the provision and sharing of extremely sensitive information which has produced extraordinary benefits to both our governments and our peoples.

And we look forward and expect that we will be able to continue sharing those—that kind of information so that the Cali cartel and other groups can be dismantled. And this we expect will be done by working with honest, qualified officials.

Mr. MENENDEZ. I appreciate your answer.

Now let me go back to my question. My question is, have you or Ambassador Skol or anyone at the State Department to your knowledge raised questions about sharing information with Major General Octavio Vargas Silva?

Mr. SKOL. Congressman, that goes into what we know or what we don't know, and intelligence sources. I personally could not feel that is an appropriate specific theme to be discussing in this session.

Mr. MENENDEZ. Is that your response?

Mr. GELBARD. Yes, sir.

Mr. MENENDEZ. Even though I am not asking you what the information is, you are willing to tell me that you had a conversation to raise very serious questions about potentially alleged drug money with the President elect of Colombia. Yet you won't tell me that you have concerns, if you have them, with an officer of the Colombian—the equivalent of our DEA. Is that what you are telling me?

Mr. GELBARD. Well, we have had concerns about a number of officials in the government, but as Ambassador Skol says, I really think it would be inappropriate to get into the issue of individuals in this forum.

Mr. MENENDEZ. Let me ask you another line of questioning. I am going to ask the Chairman that if it is possible, I am not quite sure of the rules, but if it is possible, at a certain point that we hold a hearing within the purviews of being able to get some of these answers in the proper forum, because I think they go to the heart of the concerns that the Chair has, and I think the ranking member has.

I would like to get the answers. I want to know what I am dealing with here. And when I have to cast votes on serious questions of—Mr. Lantos talked about NAFTA extension, we are talking about our intelligence, sharing our intelligence, and I want to do that, but I want to be as secure as I possibly can that I am sharing intelligence with people who have common goals and that we can be somewhat secure that those purposes are going to be met.

Let me ask you this. The question is President-elect Samper's letter to Chairman Hamilton which I believe we also have received a very similar copy of. He says, nevertheless, referring to these accusations, "I have called for a special investigation to carefully examine all of these issues and apply necessary actions to protect the integrity of my government."

What is the process of this investigation, and do we have confidence in the ability of whatever that process is to render a decision that we would rely upon?

Mr. SKOL. As Ambassador Gelbard said previously, Congressman, the most appropriate forum for an investigation would seem to be the independent fiscal. Fortunately there will be a new fiscal sworn in very shortly. Everything we know about him shows that he is independent and untainted. And that would be the kind of investigation that President-elect Samper appears to be calling for. It would be the kind of investigation presumably that would unearth the truth and that would ultimately satisfy you and us and the Colombians as to what happened, if in fact they can get to the bottom of it in a difficult kind of investigation.

Mr. MENENDEZ. So let me just get this straight. Has President-elect Samper said that this is the entity that he wants to conduct an investigation?

Mr. SKOL. To my knowledge, he has not specifically said who would conduct the investigation.

Mr. MENENDEZ. I see. But if he were to say that if he has got—we would have confidence in that entity?

Mr. SKOL. That is the institution of the Colombian system that would be independent of the government, the administration, and would appear to be the appropriate entity that conducts such an investigation. And as much as we know about the person who has been appointed to that position, we suspect that he is the kind of person who could bring this about.

Mr. MENENDEZ. Let me lastly ask you, in that same letter where the President-elect refers to an elite investigation corps will be created to confront corruption and send the cartel's political cronies to jail, we will submit to Congress a very strict anticorruption law, it

goes on to talk about new laws to strike the laws against money laundering.

That paragraph to me further concerns me in the context of what systems—and I admire the admission that we need an elite investigation corps separate and apart, I gather, from the independent prosecutor, I guess that is what the President-elect is talking about—maybe you can shed light on that; a new anticorruption law, further laws in other aspects as it relates to money laundering.

In essence, it concerns me that what we have is a system permeated with a very serious concern by the nation's leading citizen about what it is in terms of corrupt practices within the government.

Again, us sharing information in this process throughout this network of government officials, what are our concerns? Have we specifically identified concerns?

Mr. SKOL. Legislation in Colombia, for example, against money laundering has been identified as insufficient, and we agree very much with the notion that there should be new, tough antimoney-laundering legislation.

The same letter proposes an inter-American convention on money laundering. We have no details thus far on just what that would entail. But it sounds like a relatively good idea.

In terms going back to the general question of sharing of evidence, sharing of information, sharing of intelligence, we and our individual agencies are extraordinarily jealous and protective of sensitive intelligence. We have stopped sharing evidence when sharing of evidence has not produced the effect that it should. This was the case with a sad history of noncooperation against drugs by the past, the about-to-depart fiscal, Mr. de Greiff. We are hoping for a situation in which we can share evidence and not endanger witnesses and other sources and methods.

There is a continuing interest in not allowing our information, our evidence, our intelligence to be misused, to be not used, to be dissipated, to be wasted. And that kind of vigilance has to go on all the time.

Because one fact that is clear, that everyone agrees on, everyone, that the Cali cartel and other traffickers have enormous amounts of money, and they are trying to bribe the people and institutions in Colombia and other countries. And they will keep trying.

And it is the responsibility of governments to devise systems and appoint people who will resist and who will do things institutionally that will prevent that from actually happening. And it is our responsibility to make certain that the people with whom we work, in Colombia or Peru or any other country, are the kind of people that we can give funding to.

Congress prohibits funding of people we suspect of narcotics activities. Nor will we give evidence or intelligence to individuals, to institutions that we suspect. But it is a program of constant vigilance.

We look at the letter, as you look at the letter, as an opportunity for we and the new Samper administration to work together to continually make these judgments and make the corruption less possible or impossible.

Mr. MENENDEZ. Mr. Chairman, I will just close by saying I like flan. I grew up a lot on flan. But I also believe that, you know, you are taking the road that the proof will be in the pudding of what happens henceforth. I would like to know before we move henceforth, from what foundations are we moving. I don't like to share the ingredients for my flan unless I know in fact that we are sharing it to make the ultimate goal a reality.

There are some things that can be done to seem as if you are moving ahead, and that to me is not sufficient. I would like to see a strong basis. And I would like to see—I don't have the time to pursue it, but I would like to see some of the detail of what it is that we are considering real actions as it relates to a proper response by the Colombian Government.

Thank you.

Mr. TORRICELLI. Thank you. I want you to know, not having had flan, I feel at a great disadvantage at this hearing.

Mr. MENENDEZ. You are really missing out. It is better than creme brulee.

Mr. TORRICELLI. Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman.

I want to welcome our panelists to a very important issue as we take a look at our relationship with Colombia. As you know, Senator Helms had put in an amendment in the Foreign Operations authorization, and it was subsequently withdrawn in conference, but he was talking about limitations and the use of funds for the Government of Colombia. He said he wanted to limit those based on a full investigation of accusations of corruption by the narcotics cartels involving senior officials; the Government of Colombia implementing the local law enforcement steps necessary to eliminate, to a maximum extent possible, bribery or other public forms of corruption; reduce illicit drug production and the maximum extent which was determined to be achievable during the coming year; significantly disrupt the operations of the narcotics cartel and investigate all cases in which a senior government official is accused of or implicated in facilitating or encouraging the production of illicit narcotics or other controlled substances.

I assume you are familiar with that amendment and that you have done some work with regard to to. Have we taken a look at any of these issues, and were you satisfied that the administration was assuming the responsibility of trying to examine these issues?

Mr. GELBARD. Congressman, as you are aware, the administration strongly and very vigorously opposed this amendment.

Mr. GILMAN. I know the opposition. What I am asking is, have we taken a look at any of these issues seriously?

Mr. GELBARD. We have looked at some of these issues, at all of these issues. I will just say that this goes to the heart of something we were discussing before you arrived, Congressman.

The issue of cutting off funds for programs which ultimately benefit us, is something I have never been able to come to grips with. The kind of programs we are talking about in Colombia are for counternarcotics purposes. If our goal is to try to prevent cocaine from being manufactured and transported to the United States and then we put limitations on our ability to stop the production and transport of cocaine, I get very confused and frustrated.

I don't question the motives of the amendment by any means, and we are obviously concerned with the points that were raised. But we will consistently oppose any legislation which tries to limit the funding for programs aimed at counternarcotics.

Mr. GILMAN. You made some very glowing statements about the new—the incoming President, and we had an opportunity, some of us, last week to meet with some of the new members of his cabinet. Of course, the expressions of support to what we are seeking to do were encouraging.

But, you know, for those of us who have been involved in the narcotics battle for so many years, and Ambassador Skol and yourself have been involved, we have been hearing all kinds of glowing promises in the past.

We are wondering now whether this country that has virtually been hostage to the narcotics traffickers are going to be able to fulfill their promises of turning this around. I welcome your thinking.

How are they better able to accomplish these noble objectives that they have given, that they have stated to us, based upon past history of a nation that has been so involved with heavy trafficking, and where the traffickers have had such significant influence of every facet of that country, including the parliament, including the highest officials in that country? How better are they going to be able to achieve the kind of goals that we are seeking than prior administrations?

Mr. GELBARD. We have been spending a considerable amount of time working with the individuals in the new administration. Ambassador Skol and my deputy, Chris Arcos, met with President-elect Samper several weeks ago. As we were discussing, there were a number of us in the administration as well as in Congress who met with the ministers designate for foreign affairs, defense, and justice.

Our new Ambassador in Colombia, Myles Frechette, has been holding extensive discussions already with these people. They come from the same party as the outgoing Gaviria government with which we have had superb cooperation. And the work that President Gaviria and his ministers have done in cooperation with us has produced outstanding results.

Because it is the same party, because the transition is something we expect to be a lot smoother than if it were to an opposition party, we would expect that there would be a very strong base on which to build. In our discussions last week with the ministers designate, we had very detailed talks about some very precise issues on which we hope to build much greater cooperation.

A number of these points were raised by various members of this committee in relation to Samper's letter. For example, money laundering, where there has not been much progress in Colombia in the past; control over precursor chemicals; and the kind of work we would hope to do together to dismantle the Cali cartel. We had extensive conversations regarding judicial action and improving the programs we can work on together in that area.

So we will now have to see, based on these individuals with whom we will be working. Some of them are already well-known to us from the past.

Mr. GILMAN. Mr. Ambassador, you said we had good relationships with the prior administration, and you hope to continue. Have we been successful with the prior administration in our efforts of cutting back on the amount of product coming out of Colombia?

Mr. GELBARD. I think there has been a lot of progress in the dismantling of the Medellin cartel, as you are aware. There has been some progress made against the Cali cartel. And we expect that building on the cooperation we have developed with them, with the Government of Colombia, the current government, we will be able to have very effective results that we would hope for in the near term.

Mr. GILMAN. I am looking at some statistics provided by the Administration. Seizures of cocaine in Peru were down 37 percent in May, and down 66 percent in June. I assume some of that had to do with the cutoff of the radar, but not all of it can be attributed to that.

How do we account for the fact that we had good relationships with that government and yet the seizures go down? Just this past week we heard about close to a ton of seizure in either Arizona or New Mexico of cocaine which came out of that part of the world.

How do we account for these massive seizures at home at a time when you are pleased with what we are doing?

Mr. GELBARD. Well, one way to look at it would be the fact that we are able to seize the drugs is a good sign.

Mr. GILMAN. Outside of Colombia. I don't think it has anything to do with what they are doing with regard to their production.

Mr. GELBARD. Well, I would have to disagree—quite often the trail of information starts at the site of production and the shipment goes through and is not seized for a variety of purposes, and seizures can be made in a variety of locations.

Mr. GILMAN. You know, for the first time since the Carter administration, we have seen an increase in drug use amongst our own population, and a good chunk of it is cocaine and a good chunk is heroin, and we have Colombia involved in the production of poppies and of the hard substances that provide the kind of substance that makes for this kind of abuse.

Are we going to reevaluate our strategies now and try to find a better way of interdiction, of eradication, of enforcement, instead of just concentrating on hard-core abusers?

Mr. GELBARD. In fact, we are not just concentrating on hard-core abusers. We have a balanced strategy with emphasis on both supply reduction and demand reduction.

We in fact are trying to work with the source countries as closely as possible, particularly Colombia, Peru, and Bolivia, as well as others. And we feel that we are making significant headway.

In fact, we feel that the cooperation that has been built up over the last years is indeed paying strong dividends, particularly in Colombia.

Mr. GILMAN. Has your budget, International Narcotics Matters budget been restored? I know it was cut back significantly, and we try to restore it to some extent in the Congress, but we didn't hear very much about the administration supporting some increases in next year's budget.

What is your proposal for International Narcotics Matters budget for the forthcoming year?

Mr. GELBARD. First of all, Congressman, thank you for asking. Your support for counternarcotics funding has been gratifying.

My budget has been cut dramatically the last 2 years. Our request was in the range of $150 million. This fiscal year it was cut to $100 million. For next fiscal year it has been cut to $105 million. We are continuing to request for fiscal year 1996 in the same area of 150 or so.

In addition, we are seeking significant increases in funding for economic development to support programs drawing coca farmers away from production of coca. And we are also seeking significant increases over what was actually appropriated for military assistance to support counternarcotics efforts.

We need help, because all our budgets have been reduced across the board. And I am not speaking just for mine but also for other law enforcement agencies too.

Mr. GILMAN. Well, I would hope that as you prepare your budgets, that you let this committee know of these drastic cuts. We would like to be of help to you.

But also, the administration should make its voice known with regard to the importance of these kind of cuts rather than continually talking about how important it is to get rid of the hard-core abusers and forgetting about interdiction and forgetting about eradication and forgetting about some of the other aspects of our battlefield out there.

We need that kind of attention being given to these issues, and we don't hear too much of it coming out of the western part of Pennsylvania Avenue. I think we need a lot more administration support for these kind of efforts that so drastically affect what we are trying to do.

I do have one or two other questions. Back in June at a hearing, we were told the radar may be turned on in some 48 hours after it was cutoff. More than 6 weeks later the situation is still unresolved. Can you tell us why the delay?

Mr. GELBARD. Yes, Congressman. As I have explained earlier, we immediately proposed interim agreements, and based on discussions I had with the Governments of Colombia and Peru in their capitals, I felt a great degree of certainty that those governments would agree to these interim agreements while our long-term solution, the amendment that the administration has proposed and is currently in the Defense Department authorization bill, was pending.

Nevertheless, neither government has responded positively, preferring to wait for our legislation to be approved. We have made several approaches to those governments, but we have not received positive responses.

Mr. SMITH. If the gentleman will yield, Mr. Ambassador, what did they object to?

Mr. GELBARD. In the case of Peru, we never got a response of substance, which astonished me. In the case of Colombia, they presented us with a counterproposal, but given the legal constraints under which we are currently operating, as has been explained earlier, it was inadequate. I was also told by the current Colombian

Government that they also were very willing to wait for the congressional approval of new legislation.

Mr. SMITH. In the Peruvian Government, to whom was your request for an interim agreement addressed and how aggressively was that pursued?

Mr. GELBARD. It was pursued very aggressively. I discussed it myself with an inter-ministerial team at very high levels when I was in Lima. And we then had several attempts through our embassy to do so once again, also at very high levels, with the foreign ministry, the defense ministry, the police, and the ministry of interior.

Mr. SMITH. Is it still pending?

Mr. GELBARD. Yes, sir.

Mr. GILMAN. Mr. Ambassador——

Mr. GELBARD. But I would hope that since the Department of Defense authorization bill is in conference right now, that we might have approval imminently for this legislation which was passed unanimously in the Senate and, as we discussed earlier, prior to recess.

Mr. GILMAN. Mr. Ambassador, you talked about the importance of eradication and to get some sort of a substitution program going. When we met with the cabinet officials last week or whenever they were here, Colombian cabinet officials, we discussed with them the fact that there had been promises made to the peasants who were growing the poppies and the coca that if they would substitute their crops, they would be paid. We found that in looking into the matter, that very little had been paid after those grandiose promises were made, and despite the fact that there were some international funds that were provided for eradication.

Have you looked into that aspect of eradication?

Mr. GELBARD. We are actively engaged with the Government of Colombia on the issue of eradication of both opium poppies and coca. The issue of alternative development or crop substitution programs with Colombia has never arisen.

As I mentioned earlier, I have had discussions with the World Bank recently, during which the World Bank committed itself to providing programs for alternative development and crop substitution with nations in Latin America and elsewhere as those nations desire.

So the opportunities are there for those governments to develop such programs, and we are prepared, of course, to work with those governments in working with the World Bank.

Mr. GILMAN. There was a crop substitution program ongoing in Colombia, and the peasants had cut back in their production, and because they had not been paid, they were very frustrated and went quickly back to the production of a coca crop and a poppy crop.

Mr. GELBARD. By definition, all opium poppies and coca in Colombia are illegal, and the Government of Colombia, to my understanding, has always vigorously opposed the idea of compensation or economic development programs, unlike the programs in Peru and Bolivia.

Mr. GILMAN. The cabinet-level people acknowledged this was a problem. I don't know what kind of a program they had, but apparently there had been some sort of an eradication program.

Mr. GELBARD. I discussed in detail the issue of eradication of both opium poppies and coca with the three ministers, and along the lines of what we have been pursuing jointly with the Gaviria government, and they were very positive about continuing these efforts.

Mr. GILMAN. Well, I would hope that if they are going to continue, that we oversee and have some sort of monitoring of what is being done to make certain that if they make promises to the farmers, that they are going to keep them. Otherwise you are not going to get very much cooperation for them in producing areas.

Mr. GELBARD. If I could just add one point——

Mr. GILMAN. Yes, but regrettably, now Colombia has become one of the major poppy-growing areas in Latin America, and taking over from where Bolivia has left off, and not only do we have a coca problem in Colombia, but today we have a heroin problem. It is becoming even greater as the days go on, and we find that a greater amount of the production is coming out of that area.

So this should be a priority, needs priority attention by your department.

Mr. GELBARD. It is. And we have put considerable—we have considerable funds available for coca and opium poppy eradication in all three countries: Colombia, Peru and Bolivia.

I had significant discussions with the three ministers about having a very strong eradication program in Colombia. And I certainly left with the feeling that there will be a very strong eradication program forthcoming.

Mr. GILMAN. Is that eradication by spraying or going out and pulling up plants?

Mr. GELBARD. Spraying.

Mr. GILMAN. Thank you.

Mr. GELBARD. I would also just like to add that in terms of seizures, 4 metric tons of cocaine were seized in Colombia in July alone. So I think that is good news.

Mr. GILMAN. We are hoping that both you and Ambassador Skol will be giving this matter a great deal of attention as you have in other areas. We count on you to let us know what more has to be done by funding some of these critical problems. We are here, you know the old saw in Congress, we are here to help you.

Mr. TORRICELLI. Thank you.

Mr. Smith, do you have anything further?

Mr. SMITH. Mr. Ambassador, I did reference this in my opening statement. I am sure you are aware that Amnesty International has, for the first time in more than 30 years, called on our Government, to suspend military assistance to Colombia.

And, the Amnesty memo indicates they have asked five questions. Based on the response, plus what they consider to be Colombia's record on human rights and the complicity of security forces in the commission of those human rights violations, Amnesty believes the suspension would be warranted until reforms are undertaken.

Let me raise one question, and the brief summary of the response. To what extent, they asked the department, has there been a diversion of U.S. funds designated for counternarcotic programs to counterinsurgency? They point out that the reply by Ambassador Arcos stated that the funding is, "exclusively for counternarcotics support to the Colombian armed forces."

This is more of a statement, they go on to say, of intent rather than a statement of fact since there is no unit of the Colombian armed forces that is exclusively dedicated to counternarcotics. The intention is for the money to be used for counternarcotics support, but the equipment could just as easily be involved in other activity.

How does the administration respond to that?

Mr. GELBARD. We have had a very serious dialogue with Amnesty International in particular, conducted by my deputy, Ambassador Arcos. We are obviously very concerned about those charges. We have been working through our embassy to establish very strict end-use monitoring methods. We would be happy to provide you details on that. We have provided such details to Amnesty International.

We will continue to watch this very closely. We are very aware that the Congress has authorized and appropriated these funds solely for counternarcotics purposes. It should be noted, though, that some insurgent groups such as the FARC, and in the past some others, are also engaged in narcotics production or trafficking. And therefore there can be occasions when those organizations are involved in narcotics trafficking.

But we try our hardest here in Washington and through our embassy to assure that as rigidly as possible, the sole purpose of any programs that we have are for what was legally determined.

Mr. SMITH. I do understand the line of demarcation cannot be so easily established in many of these instances. Was the information that you will provide to us provided before they came to their conclusion on July 26, to the best of your knowledge?

Mr. GELBARD. I am really not aware. Was that July 26? Then I think, yes, we had provided the information.

Mr. SMITH. Perhaps they weren't convinced. But I do look forward to reading the information that you will provide.

Mr. GELBARD. I would note I have just received a copy of a letter dated today that Amnesty International has sent to me as well as to two of my colleagues. I have not had a chance to read this yet, obviously, since I just received it now. But I will be examining it very carefully.

Mr. SKOL. I should note, Congressman, the three ministers who were here last week did meet with Amnesty International and it was considered by Amnesty International an important gesture, an important demonstration of a promise, a commitment as to what will be the case in the next administration.

Mr. TORRICELLI. Ambassador Skol, thank you for your testimony.

Ambassador Gelbard, Ms. Roseborough, we appreciated your July testimony, we appreciated your August testimony, and I trust there is no doubt that if this matter on sharing information is not resolved, we will be appreciating your September testimony.

Mr. SKOL. Mr. Chairman, if I may add, I will see if the State Department has anything in its cafeteria like flan to give you a taste.

Mr. SMITH. Mr. Chairman, I do have some questions for the record.

Mr. TORRICELLI. The record will be kept open for 48 hours to allow Mr. Smith's questions and subsequent answers.

Thank you very much.

The meeting is adjourned.

[Whereupon, at 4:35 p.m., the joint subcommittees were adjourned.]

APPENDIX

OPENING STATEMENT
CHAIRMAN ROBERT G. TORRICELLI
HEARING ON U.S. RELATIONS WITH COLOMBIA
AUGUST 3, 1994

Six weeks ago, the Western Hemisphere and International Security subcommittees held a joint hearing on the Administration's counternarcotics strategy for the hemisphere. Our specific concern was a new legal ruling by the Executive Branch that was preventing the United States from sharing radar intelligence with our Andean neighbors. We believed that this cessation of information was having an extremely detrimental impact on our drug interdiction activities, and perhaps an even more troubling impact on the state of United States relations with our Andean neighbors.

I believe that I speak for my colleagues in saying that when we left that hearing six weeks ago, we felt we had received a guarantee from the State Department that our government and the governments in the region were going to resume a level of close counternarcotics cooperation. While a final solution to the radar intelligence problem awaited Congressional action, we were told that an interim agreement which would allow a resumption of information sharing would be negotiated with Colombia and Peru in a matter of days.

As we meet this afternoon, however, the information sharing still has not resumed. And, as a result of that circumstance, as well as several other troubling developments, relations between Colombia and the United States have reached a new low. Indeed, recent events and U.S. policy shifts have created confusion and outrage in Colombia and have left the impression that the United States is retreating from the war on drugs.

Today, we hope to analyze the sources of tension in the United States' relationship with Colombia with two officials from the United States Department of State -- Ambassador Robert S. Gelbard, Assistant Secretary for International Narcotics Matters, and Ambassador Michael M. Skol, Principal Deputy Assistant Secretary for Inter-American Affairs. Also present to answer legal questions is Teresa Roseborough, Deputy Assistant Attorney General from the Office of Legislative Counsel at the Justice Department.

The Clinton Administration cannot afford to send mixed signals to Colombia on an issue as important as the war on drugs. Nor can the narcotraffickers have any doubts about American resolve on this matter.

Only last fall, the United States Government hailed Colombia for dismantling the violent Medellin cocaine cartel, for its efforts to reduce drug production, and for battling narco-related corruption. Despite recent tensions, the United States and Colombia must not lose sight of the fact that it will take a great deal of combined effort to tackle drug trafficking at its source.

Many aspects of our relationship with Colombia are positive. It is my hope that today we will accomplish what our earlier hearing set out to do: a reaffirmation of our two countries' commitment to work together to fight the war on drugs.

STATEMENT BY MICHAEL M. SKOL
PRINCIPAL DEPUTY ASSISTANT SECRETARY
BUREAU OF INTERAMERICAN AFFAIRS

HEARING BEFORE THE
HOUSE FOREIGN AFFAIRS COMMITTEE
SUBCOMMITTEES ON

Western Hemisphere Affairs

and

International Security, International Organizations
and Human Rights

Wednesday, August 3, 1994
2:00 pm, Room 2200
Rayburn House Office Building

Mr. Chairman, Members of the Committee.

I am pleased to have the opportunity today to discuss with you the complexity of our relationship with Colombia, the country that has been our foremost ally in the counternarcotics effort. It is said that nothing in life is simple, and with respect to our interactions with Colombia, that is an understatement. Our two countries today have the lead in facing one of the most difficult problems confronting society, illicit narcotics. We are the principal consumer and Colombia the principal producer of cocaine. But, Colombia is much more than a producer of drugs. It is a leader within the hemisphere in economic reform. Its economic management over a period of decades stands as a model for other economies. It has taken dramatic steps to fundamentally revamp its judicial system, and while that task is far from completed, Colombia is clearly a hemispheric leader in modernizing that vital arm of democracy. It also can exercise a pivotal role in regional security. Colombia is an important U.S. partner in the hemisphere and we are now looking to the future with an eye toward strengthening the relationship.

Cesar Gaviria Trujillo steps down on August 7 when Colombia inaugurates its new and democratically elected president, Ernesto Samper. President Gaviria's departure closes a chapter in our bilateral relationship with Colombia, a chapter in which an extraordinary level of cooperation evolved from our mutual interest in bringing to justice fugitive narcotics kingpin, Pablo Escobar. While this chapter ends, the book on Colombia continues. Within the context of the counternarcotics issue, which is fundamental to our relationship, both we and the

Samper administration must now turn our attention toward the dominant Cali and other smaller narcotics trafficking organizations.

As in any new relationship we are entering into a confidence building stage. That stage is complicated because recent events have caused each nation to doubt the other's reliability. There have been revelations in the press of taped conversations in which a leading Cali cartel narcotics trafficking kingpin and another individual discuss the kingpin's plans to contribute substantially to the Samper campaign with the expectation that the yield will be a "friend" in the presidency. The president-elect's people have told us that contributions were carefully monitored to avoid the possibility of major contributions that would have narcotics links. In addition, they have promised to investigate the allegations.

We met last week with three of the new government's ministers-designate. They assured us it was the intention of the Samper administration to pursue vigorously narcotics trafficking kingpins and to work to dismantle trafficking infrastructures. The task they outlined for themselves is a difficult one.

The Colombian political reality is that there is currently no public outcry demanding that the government pursue Cali and other smaller narcotics trafficking organizations. Some citizens of Colombian fear that going after the Cali narcotics trafficking organization will provoke the organization to react with an Escobar-style of violence. The spectre of bombs in the streets of major cities is a price no one wants. Nevertheless, members of the incoming administration assure us they intend to act aggressively to capture cartel leaders and to dismantle organizations.

Fundamental to our expectation that we can successfully advance our counternarcotics interests in Colombia is that we are not asking Colombia to do something for us. Rather, we are pursuing our own vital interest through our willingness to support the government of Colombia in an endeavor which is equally crucial to its own future.

Neither we nor the Colombians have only a single interest to pursue within the relationship. For us counternarcotics is the pivotal issue, but it is not our only interest. Our other key interests are to diminish human rights violations, to see the growth and expansion of democratic institutions, i.e. the judiciary, to gain Colombia's support in important issues which are before multilateral fora, i.e. regional security problems, and to expand U.S. trade and investment in Colombia. Our

challenge then is how best to work with the Ernesto Samper administration to accomplish these broad objectives, and our response is full engagement.

Colombia is a healthy, prosperous country with a sound economy. U.S. assistance serves the interests of both our countries, but it is not essential to Colombia's economic well-being. What Colombia needs from us is cooperation, and it is the act of cooperation which opens other doors and gives us the tools with which we forward our other goals.

Promotion of respect for human rights is a basic tenet of this administration, and all of us here recognize that human rights violations continue to occur in Colombia. It is a serious situation -- too many violations are perpetrated by security forces members and too many violators go either unpunished or negligibly punished. That is not to say the outgoing government has not made a concerted effort to promote change -- it did. Gaviria implemented reform of the police, an office of the Defender of the People has been established and the Procuraduria, the independent government watchdog agency, conducted investigations. Much more, however, remains to be done.

We are convinced that the Samper administration shares our assessment that it must act quickly to alter the current situation, both to stop violations by security forces and to bring to justice those who act improperly. The considerable positive progress already achieved and the clear commitment of the Samper government to respect for human rights articulated by his ministers-designate last week suggests strongly that a concerted effort to end violations will be made.

Respect for human rights is precisely an area where we can be and have been helpful. A priority concern is impunity and how to attack it. We have sent in experts from our own military justice system who met with the entire range of civilain and military officials who deal with human rights in Colombia. Together they developed a curriculum on how to deal with violators, who work for the government. The course will be taught to military and police personnel. The Colombian instructors, who are both civilian and military, are being trained in the U.S. at the Navy Judge Advocate General's School and will return to Colombia to be multipliers.

We have been encouraging the Colombian government to meet and talk with the NGOs. Thus, we were pleased that the ministers-designate who were in Washington last week had a breakfast discussion with Washington-based NGOs. The minister

of defense designate has spoken extensively with us about his ideas for institutionalizing human rights mechanisms within his ministry. His ideas are good, and we want to continue to be in a position to help. That is best done if we are engaged in all aspects of the bilateral relationship.

With the promulgation of its new constitution in 1992, Colombia changed its judicial process from an inquisitorial to an accusatory system. Helping Colombia make that transition, helping it imbed this vital democratic institution into the society has been a key U.S. goal for the past two years. It is a goal that is inextricably linked to counternarcotics, since traffickers, through intimidation and bribery, are the greatest threat to the nascent system.

USAID is funding an Administration of Justice program that has been designed to address a host of interrelated problems that long characterized the sector. At the core of our program, however, has been the effort to help the Colombians overcome the incapacity of the previous system to perform basic prosecutorial and investigative functions effectively. An effective counter-drug capability in Colombia is crucial to U.S. interests, and a functioning criminal justice system that can confront criminals and powerful criminal organizations is vital not only to the counter-drug effort but also to functioning democracy.

Colombia is today a major player in regional and hemispheric issues. Its outgoing president is the incoming secretary general of the OAS. Not only do we have a clear and vested interest in being able to work with the man who will run the OAS, we also want and need to be able to work with Colombia on crucial hemispheric issues. A bilateral relationship of mutual respect and cooperation is essential to forwarding our aims. By looking to the future with the Samper administration and by not prejudging our ability to work together, we hope to lay the groundwork for a fruitful relationship on multilateral issues.

As noted earlier, U.S. assistance is marginal to Colombia's need. Colombia has one of the strongest economies in Latin America. Thus, in spite of the extraordinarily high level of violence that continues to plague that country, it is attractive to U.S. investors and traders. U.S. trade to Colombia jumped by over 68 percent in the period 1990 to 1993, due to the previous government's aggressive economic liberalization program. U.S. investors account for over 60 percent of foreign direct investment in Colombia. There is growing interest in the energy sector and newly privatized entities, like telecommunications and transportation.

Likewise Colombia has been a dynamic force for regional integration, reviving the moribund Andean Pact and pushing for liberalizing policies, such as protection of intellectual property rights, a key U.S. interest in the region.

Colombia, along with Chile, is a model of prudent economic policies that work. Economic policies are implemented in a democratic fashion through legislation, consensus building and constitutional reforms.

Our relationship with Colombia has been characterized by constructiveness and maturity. Friends talk and friends disagree. Recent disagreements, real and imagined, have been the subject of numerous press reports. Both we and the incoming Samper administration, however, agree that on key points -- counternarcotics is central to the relationship and the relationship is better served if discussions are kept out of the press. We look forward to working with the Samper adminsitration in continuing unrelenting pressure on narcotics traffickers and in expanding the whole of the relationship.

Statement by Robert S. Gelbard
Assistant Secretary of State
for International Narcotics Matters
before the House Foreign Affairs Committee
Subcommittees on
International Security, International
Organizations, and Human Rights
and
Western Hemisphere Affairs

Wednesday, August 3, 1994
2:00 pm, Room 2200
Rayburn House Office Building

I am pleased to have the opportunity today to brief the Committee on the status of our counternarcotics relationship with the Government of Colombia. Ambassador Skol's statement addresses the broad range of important policy issues the Administration is pursuing with the Colombian government. I will focus on our counternarcotics relationship.

Our relations with Colombia during the past few months have been strained. Colombian Prosecutor General de Greiff's unique ideas, the suspension of intelligence sharing, the Senate's recent amendment on Colombia to the Foreign Operations Appropriations Bill, and allegations against President-elect Ernesto Samper have strained a traditionally close and cooperative relationship. It has not been an easy few months. However, through our mutual concerns and a real desire to right the differences in our relationship, we and the newly elected Colombian government have established a framework for cooperation from which we can both operate. I am pleased to tell you that we have made concrete progress.

We, President-elect Samper and his representatives engaged in a steady dialogue in June and July. We both agree that there is no other single issue that affects our two nations as acutely as drug control, and believe that good bilateral relations must recognize this fact. We also agree that success on other issues important to both of our governments -- such as trade and investment -- will depend on good counternarcotics cooperation. These simple admissions are a beginning. With them, we have established a candid ongoing dialogue on a broad array of narcotics issues which we hope will lay the groundwork for achieving our common counternarcotics objectives. We will proceed cautiously and await concrete actions to substantiate our informal spoken agreement.

On June 29, Ambassadors Skol and Arcos met with President-elect Samper in New York. We discussed concerns over the information alleging drug cartel financing of Samper's campaign. We also raised our concern that, if the allegations were true, they would drastically impair efforts to dismantle the Cali cartel and, in turn, measurably alter our relations. We agreed that the best answer to these concerns was an aggressive counternarcotics effort. Both sides offered actions that would confirm our mutual commitment to the fight against drug trafficking. The meeting ended with all the cards on the table. President-elect Samper knows the cooperation that the United States hopes for from his government, and we understand what he expects of us.

On July 15, President-elect Samper sent a letter to several Members of Congress, including several Members of this Committee, reaffirming his commitment to fight drug trafficking. He promised a strong drug program and expressed hope for continued US international narcotics control assistance. He proposed a series of reforms, including the reform of Colombia's penal code, criminalization of money laundering, and increased judicial cooperation with the US Government. We support these proposals completely.

Last week, three Colombian Ministers-designate -- from Foreign Affairs, Defense and Justice -- met with myself, several other senior Administration officials, and Members of Congress to discuss in more detail our mutual counternarcotics goals and avenues for reaching these goals. We discussed how the Samper Administration might counteract the negative allegations of drug cartel influence in the campaign and the public perceptions of such, by taking positive measures to demonstrate willingness to fight drug trafficking. Samper's Ministers reiterated their commitment to developing a cooperative counternarcotics relationship and working toward specific goals in areas of counternarcotics interest. We both believe that these goals and criteria are fair and attainable.

While it would be inappropriate to detail in public our private conversations with the incoming administration of Ernesto Samper, I would like to share some of our most important expectations with you today. They should not come as a surprise:

-- We hope to work with qualified officials, committed to a serious effort against narcotics traffickers.

-- We expect serious efforts against the Cali cartel and its senior leaders, including arrest, indictment, and incarceration.

-- If the current text of the Colombian Criminal Code allows traffickers to serve only token sentences or walk free, then we hope the government will seek changes in the law, just as we seek to change our domestic law to permit cooperation with Colombia on narcotics interdiction.

-- We expect serious efforts on eradication of coca and opium poppy, money-laundering, controlling precursor chemicals, and interdiction.

Our message is simple: Colombia and the United States share a common adversary. This adversary attacks the national security of both our nations. It is in both our interests to work together. We expect the Samper government to do its part, just as they expect we will do ours. Our counternarcotics goals in Colombia and elsewhere around the world are not new. We developed performance targets immediately following the 1993 narcotics certification exercise with Congress, and presented them formally to the government of President Gaviria and a number of other governments earlier this summer. We consider the global certification exercise to be an excellent device by which we, the Executive Branch and the Congress, can measure the adequacy of our programs overseas and make a reasoned judgement at the end of the year as to the level of cooperation not just in Colombia, but throughout the world. It is only fair that President Samper and his Ministers should have no doubt as to our expectations of Colombia on counternarcotics performance.

Throughout this summer, we have stressed to the outgoing and incoming governments of Colombia that the United States Government wants to continue our longstanding cooperation on counternarcotics. In fact, we want to strengthen it. I look forward to the day that the Clinton and Samper Administrations can jointly announce the dismantling of the Cali cartel, imprisonment of its members, divestiture of its drug-derived assets, and the eradication of all opium poppy and coca leaf in Colombia. This Administration looks forward to a full range of cooperation with President Samper and his government. We recognize that Colombia is pivotal to international efforts to reduce drug trafficking, associated illegal financial activity, illicit crop cultivation and demand reduction. We are proud of our cooperative efforts with President Gaviria. We hope for the same with President Samper. If we can maintain the past level of cooperation, the future holds promise. We have identified common goals. We have made mutual commitments. Beginning next Sunday with President-elect Samper's inauguration, we look forward to translating our commitments to action.

QUESTIONS FOR THE RECORD SUBMITTED TO TERESA ROSEBOROUGH
Subcommittee on Western Hemisphere Affairs
Hearing about U.S. Relations with Colombia
August 3, 1994

1. Provide copy, to be printed in the hearing record, of the Office of Legal Counsel Memorandum for the Deputy Attorney General, "Regarding United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking," dated June 17, 1994.

2. In correcting only U.S. domestic criminal laws that we feel might be violated (i.e. 18 USC 32) by U.S. government personnel, what assurances can you give our DEA, Air Force, and Customs radar operators overseas, that they won't be prosecuted under another nation's similar statutes, as enacted as part of implementing the Chicago Convention?

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 17, 1994

The Honorable Robert G. Torricelli
Chairman
Subcommittee on the Western Hemisphere
Committee on Foreign Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your recent letter to Deputy Assistant Attorney General Teresa Roseborough concerning her testimony before the Subcommittee on the Western Hemisphere on August 3, 1994. Thank you for the opportunity to provide supplemental information for the hearing record.

As you requested, my staff has provided your Subcommittee staff with a corrected copy of the transcript of Ms. Roseborough's testimony and a copy of the memorandum from Assistant Attorney General Walter Dellinger to the Deputy Attorney General concerning United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking. Additional copies of these materials are attached.

In response to your question concerning statutes of other nations similar to 18 U.S.C. § 32, it is not possible for the Department of Justice to give any specific assurances relating to how foreign countries might interpret their domestic laws or international obligations and how they might seek to enforce such laws and obligations against American personnel. Of course, the United States government, consistent with the international rule of dual criminality, would not extradite any government employee for actions that were lawful under United States domestic law.

Again, thank you for the opportunity to provide additional information to the Subcommittee.

Sincerely,

Sheila Anthony

Sheila F. Anthony
Assistant Attorney General

Attachments

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

July 14, 1994

MEMORANDUM FOR JAMIE S. GORELICK
DEPUTY ATTORNEY GENERAL

From: Walter Dellinger
Assistant Attorney General

Re: United States Assistance To Countries That Shoot Down Civil Aircraft Involved in Drug Trafficking

This memorandum summarizes our earlier advice concerning whether and in what circumstances United States Government (USG) officers and employees may lawfully provide flight tracking information and other forms of technical assistance to the Republics of Colombia and Peru. The information and other assistance at issue have been provided to the aerial interdiction programs of those two countries for the purpose of enabling them to locate and intercept aircraft suspected of engaging in illegal drug trafficking.

Concern over the in-flight destruction of civil aircraft as a component of the counternarcotics programs of foreign governments is not novel. In 1990, soon after the inception of the USG assistance program, the United States made an oral démarche to the Colombian government informing that government that Colombian use of USG intelligence information to effect shootdowns could result in the suspension of that assistance.

More recently, we understand that the government of Peru has used weapons against aircraft suspected of transporting drugs and that the government of Colombia announced its intention to destroy in-flight civil aircraft suspected of involvement in drug trafficking. The possibility that these governments might use the information or other assistance furnished by the United States to shoot down civil aircraft raises the question of the extent to which the United States and its governmental personnel may lawfully continue to provide assistance to such programs.

On May 1, 1994, in light of these concerns, the Department of Defense suspended a variety of assistance programs. Thereafter, in a draft opinion, an interagency working group concluded that the United States aid was probably unlawful. The group included lawyers from the Criminal Division, the Departments of State, Defense (including the Joint Chiefs of Staff), the Treasury, and Transportation (including the Coast Guard), and the Federal Aviation Administration. On May 26, 1994, this Department advised all relevant agencies

that assistance programs directly and materially supportive of shootdowns should be suspended pending the completion of a thorough review of the legal questions.

As we have previously advised, after careful consideration of the text, structure and history of the Aircraft Sabotage Act of 1984, the most relevant part of which is codified at 18 U.S.C. § 32(b)(2), we have concluded that this statute applies to governmental actors, including the police and military personnel of foreign countries such as Colombia and Peru. Accordingly, there is a substantial risk that USG personnel who furnish assistance to the aerial interdiction programs of those countries could be aiding and abetting criminal violations of the Aircraft Sabotage Act. See 18 U.S.C. § 2(a) (aiding and abetting statute). We caution, however, that these conclusions are premised on our close analysis of section 32(b)(2) and should not be taken to mean that other domestic criminal statutes will necessarily apply to USG personnel acting officially.

I.

International law forms an indispensable backdrop for understanding section 32(b)(2). A primary source of international law regarding international civil aviation is the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (the Chicago Convention). The Chicago Convention is administered by the International Civil Aviation Organization (ICAO).

Article 3(d) of the Chicago Convention declares that "[t]he contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." Parties have interpreted the due regard standard quite strictly, and have argued that this provision proscribes the use of weapons by states against civil aircraft in flight.[1] For example, the United States invoked this provision during the international controversy over the Korean Air Lines Flight 007 (KAL 007) incident.[2] While acknowledging that Article 1 of the Chicago Convention recognized the customary rule that "every State has complete and exclusive sovereignty over the airspace above its territory," the United States argued that the Soviet Union had violated both Article 3(d) and customary international legal norms in shooting down KAL 007. The Administrator of the Federal Aviation Authority stated to the ICAO Council that:

> The ICAO countries have agreed that they will "have due regard for the safety of navigation of civil aircraft" when issuing regulations for their military

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[1] Article 89 of the Chicago Convention relieves a state party from its obligations under the Convention if it declares a national emergency and certifies that declaration to ICAO. To date, neither Colombia nor Peru has made such a certification. The Chicago Convention contains no explicit exemption permitting the in-flight destruction of aircraft suspected of carrying contraband or of otherwise being involved in the drug trade.

[2] On September 1, 1983, a Soviet military aircraft shot down a civil aircraft, KAL 007, that had overflown Soviet territory while on a scheduled international flight to Seoul.

aircraft. It is self-evident that intercepts of civil aircraft by military aircraft must be governed by this paramount concern.

> The international community has rejected deadly assault on a civil airliner by a military aircraft in time of peace as totally unacceptable. It violates not only the basic principles set forth in the [Chicago] convention but also the fundamental norms of international law . . . .[3]

In the wake of KAL 007, the ICAO Assembly unanimously adopted an amendment to the Chicago Convention to make more explicit the prohibitions of Article 3(d).[4] This amendment, Article 3 bis, reads in part as follows:

> (a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.[5]

Article 3 bis should be understood to preclude states from shooting down civil aircraft suspected of drug trafficking, and the only recognized exception to this rule is self-defense from attack.[6] We understand that the United States has not yet ratified Article 3 bis. There is, however, support for the view that the principle it announced is declaratory of customary international law.[7]

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[3] FAA Administrator Helms' Statement, ICAO Council, Montreal, Sept. 15, 1983, 83 Dep't St. Bull. 17, 18 (Oct. 1983). We further note that the ICAO Council Resolution of September 16, 1983, condemned the shootdown of KAL 007 and "[r]eaffirm[ed] the principle that States, when intercepting civil aircraft, should not use weapons against them." Id. at 20.

[4] See Jeffrey D. Laveson, Korean Airline Flight 007: Stalemate in International Aviation Law – A Proposal for Enforcement, 22 San Diego L. Rev. 859, 882-84 (1985).

[5] USG representatives proposed a reference to the United Nations Charter to reflect the view that an international law prohibition on the use of weapons against civil aircraft in flight would not restrict a state's right of self-defense as provided for in Article 51 of the Charter.

[6] See Steven B. Stokdyk, Comment, Airborne Drug Trafficking Deterrence: Can A Shootdown Policy Fly?, 38 UCLA L. Rev. 1287, 1306 (1991).

[7] See, e.g., Andreas F. Lowenfeld, Looking Back and Looking Ahead, 83 Am. J. Int'l L. 336, 341 & n.17 (1989); Sompong Sucharitkul, Procedure for the Protection of Civil Aircraft in Flight, 16 Loy. L.A. Int'l & Comp. L.J. 513, 519-20 (1994). But see D.J. Harris, Cases and Materials on International Law 221 (4th ed. 1991).

In addition to the Chicago Convention, the United States has ratified the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [Sabotage], Sept. 23, 1971, 24 U.S.T. 567, T.I.A.S. 7570 (the Montréal Convention). Article 1 of the latter Convention specifies certain substantive offenses against civil aircraft: in particular, Article 1.1(b) states that "[a]ny person commits an offence if he unlawfully and intentionally . . . destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight." Article 1,2 makes it an offense to attempt to commit a previously enumerated offense, or to be an accomplice of an offender.[8] Further, Article 10 requires states "in accordance with international and national law," to "endeavour to take all practicable measures for the purpose of preventing" substantive offenses.

The Montréal Convention imposes on states certain duties with respect to offenders or alleged offenders. Article 3 declares that the contracting states "undertake[] to make the offences mentioned in Article 1 punishable by severe penalties." This obligation is specified by requiring states to take measures to establish jurisdiction over certain offenses (Article 5), to take custody of alleged offenders within their territory (Article 6), and either to extradite the alleged offender or to submit the case to their competent authorities for prosecution (Article 7). Further, states have the obligation to report the circumstances of an offense, and the results of their extradition or prosecution proceedings, to the ICAO (Article 13).

Nearly all nations with a significant involvement in air traffic are parties to the Montréal Convention, and have thus incurred the responsibility to execute it. The United States implemented the Convention in 1984 by enacting the Aircraft Sabotage Act, Pub. L. No. 98-473, tit. II, ch. XX, pt. B, §§ 2011-2015, 98 Stat. 1837, 2187 (1984). Congress specifically stated that legislation's purpose was "to implement fully the [Montréal] Convention . . . and to expand the protection accorded to aircraft and related facilities." Id., § 2012(3); see also S. Rep. No. 619, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 3682.[9] The criminal prohibition now codified at 18 U.S.C. § 32(b)(2) was enacted as part of that legislation.

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[8] In general, the furnishing of information or assistance to another nation in circumstances that clearly indicate a serious risk that the information or assistance will be used by that nation to commit a wrongful act may itself be a wrongful act under international law. Cf. Article 27 of the International Law Commission's Draft Convention on State Responsibility, which provides that "[a]id or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation." Report of the International Law Commission on the Work of its Thirty-Second Session, [1980] 2 Y.B. Int'l L. Comm'n 33, U.N. Doc. A/35/10.

[9] It is undoubtedly within Congress's power to provide that attacks on civil aircraft should be criminal acts under domestic law, even if they were committed extraterritorially and even absent any special connection between this country and the offense. An attack on civil aircraft can be considered a crime of "universal concern" to the community of nations. See United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); see generally Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785 (1988).

II.

We turn to the question of criminal liability under domestic law. At least two criminal statutes are relevant to this inquiry. The first is 18 U.S.C. § 32(b)(2), which implements Article 1,1(b) of the Montréal Convention, and prohibits the destruction of civil aircraft. The second is 18 U.S.C. § 2(a), which codifies the principle of aiding and abetting liability.[10]

A.

18 U.S.C. § 32(b)(2) was enacted in 1984, one year after the destruction of KAL 007. The statute makes it a crime "willfully" to "destroy[] a civil aircraft registered in a country other than the United States while such aircraft is in service or cause[] damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight."[11] The text, structure and legislative history of the statute establish that it applies to the actions of the Peruvian and Columbian officials at issue here.

The term "civil aircraft," as used in section 32(b)(2), is defined broadly to include "any aircraft other than . . . an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days." 49 U.S.C. app. §§ 1301(17), (36) (definitions section of Federal Aviation Act of 1958). See 18 U.S.C. § 31 (in chapter including section 32(b)(2), "civil aircraft" has meaning ascribed to term in Federal Aviation Act). The qualifying language providing that the section applies to "civil aircraft registered in a country other than the United States," 18 U.S.C. § 32(b)(2) (emphasis added), has an

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[10] Other criminal statutes may also be relevant. For example, 49 U.S.C. app. § 1472(i)(1) makes it a crime to commit, or to attempt to commit, aircraft piracy. "Aircraft piracy" is defined to "mean[] any seizure or exercise of control, by force or violence or threat of force or violence, or by any other form of intimidation, and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States." Id., § 1472(i)(2). The "special aircraft jurisdiction of the United States" includes "civil aircraft of the United States" while such aircraft is in flight. Id., § 1301(38)(a). We do not consider in this memorandum whether the prohibition on aircraft piracy, or any criminal statutes other than section 32(b) and the aiding and abetting and conspiracy statutes, would be applicable to the USG activities in question here.

[11] Section 32(b) is a felony statute, and pursuant to 18 U.S.C. § 34, persons who violate section 32 are subject to "the death penalty or to imprisonment for life" if the crime "resulted in the death of any person." However, section 34 predates the Supreme Court decision in Furman v. Georgia, 408 U.S. 238 (1972), and may not be applicable consistent with that decision. In a pending case, United States v. Cheely, No. 92-30257, 1994 WL 116868 (9th Cir. Apr. 11, 1994), a divided panel of the Ninth Circuit issued an opinion on April 11, 1994, concluding that the death penalty provided for by 18 U.S.C. § 844(d) (which incorporates section 34 by reference), is unconstitutional. However, the court has, sua sponte, requested the parties to address the issue whether the case should be reheard en banc, and it remains uncertain whether section 34 can be applied constitutionally. Pending crime legislation would resolve this issue for future violations by providing a constitutional death penalty provision.

expansive rather than restrictive purpose -- to extend United States criminal jurisdiction over persons destroying civil aircraft "'even if a U.S. aircraft was not involved and the act was not within this country.'" United States v. Yunis, 681 F. Supp. 896, 906 (D.D.C. 1988) (citation omitted).[12]

Section 32(b)(2) was intended to apply to governmental actors (here, the military and police forces of Colombia and Peru) as well as to private persons and groups. When Congress adopted section 32(b)(2) in 1984, it had been a crime for nearly thirty years under section 32(a)(1) for anyone willfully to "set[] fire to, damage[], destroy[], disable[], or wreck[] any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." 18 U.S.C. § 32(a)(1).[13] This Department has sought, under section 32(a), to prosecute state actors whom it believes to have sponsored terrorist acts (specifically, the bombing of Pan

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[12] It might be argued that section 32(b)(2)'s reference to aircraft "registered in a country other than the United States" is restrictive in meaning, i.e., that the section does not protect unregistered aircraft. Moreover, we are informed that the registration numbers of aircraft engaged in drug trafficking over Colombia and Peru have in some cases been painted over or otherwise obscured. It is suggested that unregistered aircraft, or aircraft whose registration is concealed, may be made targets under a shootdown policy without violating the statute. There are several flaws in this suggestion. (1) Congress stated that its purpose in enacting the Aircraft Sabotage Act was "to implement fully" the Montréal Convention. See 18 U.S.C. § 31 note. Article 1.1(b) of the Convention (from which 18 U.S.C. § 32(b)(2) is derived) prohibits the destruction of civil aircraft as such, without regard to registration. Because section 32(a)(1) had already forbidden the willful destruction of "any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce," Congress evidently sought to discharge this country's remaining obligations under the Montréal Convention by affording the same protection to all other civil aircraft. Accordingly, the protections provided by section 32(b)(2) should not be deemed to hinge on whether a foreign civil aircraft is in fact registered; had Congress done no more than that, the United States would have fallen short of fulfilling its treaty obligations, although Congress intended that it should fulfill them. Section 32(b)(2)'s reference to "civil aircraft registered in a country other than the United States" "must be taken to refer to the class with which the statute undertakes to deal." United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916) (Holmes, J.) (construing scope of registration requirement in criminal statute). See also United States v. Rodgers, 466 U.S. 475, 478-82 (1984); Continental Training Services v. Cavazos, 893 F.2d 877, 883 (7th Cir. 1990). (2) We are advised by the Federal Aviation Authority that the concealment or obscuring of a registration number does not legally "deregister" an airplane, and that only an official act by the registering government can achieve that effect. Accordingly, suspected drug traffickers whose registration is concealed cannot be deemed to be unregistered. (3) There is no logical connection between the class of aircraft engaged in drug smuggling and the class of unregistered aircraft. Nor do we know of any empirical evidence that the two classes significantly overlap. Further, drug traffickers may own, lease or steal planes; and even if it were their practice not to register the planes they own, the owners of the planes they have leased or stolen might normally do so. (4) We are also unaware of any reliable means by which foreign law enforcers who have intercepted a plane could determine while it was in flight whether it was registered or not. Indeed, the very act of destroying a plane might prevent investigators from determining its registration (if any). Thus, it would be difficult, if not impossible, to monitor a "shoot down" policy so as to ensure that the participants in it avoided criminal liability by targeting only unregistered planes.

[13] Section 32(a) was adopted in 1956, see Pub. L. No. 84-709, 70 Stat. 538, 539 (1956).

American Flight 103 at the behest of Libya). Because of the obvious linguistic and structural similarities between sections 32(a)(1) and 32(b)(2), we read those sections to have the same coverage in this regard, i.e., to apply to governmental and non-governmental actors alike.[14]

The legislative history of the Aircraft Sabotage Act confirms that Congress intended section 32(b)(2) to reach governmental actions. The original bill was introduced as part of a package of four related measures proposed by the Administration and designed to enable the United States to combat international terrorism, including state-sponsored actions, more effectively. In submitting this legislative package to Congress, the President explained that it was largely concerned with

> a very worrisome and alarming new kind of terrorism . . .: the direct use of instruments of terror by foreign states. This "state terrorism" . . . accounts for the great majority of terrorist murders and assassinations. Also disturbing is state-provided training, financing, and logistical support to terrorists and terrorist groups.

Message to the Congress Transmitting Proposed Legislation To Combat International Terrorism, Pub. Papers of Ronald Reagan 575 (1984) (emphasis added).

Further, in testimony given at a Senate Judiciary Committee hearing on these bills on June 5, 1984, Wayne R. Gilbert, Deputy Assistant Director of the Criminal Investigative Division of the Federal Bureau of Investigation, underscored that:

> Recent years reflect increasing concern both in the United States and in foreign nations over the use of terrorism by foreign governments or groups. We have seen an increased propensity on the part of terrorist entities to plan and carry out terrorist acts worldwide.

Legislative Initiatives to Curb Domestic and International Terrorism: Hearings Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 44 (1984) (Hearings) (statement of Wayne R. Gilbert) (emphasis added). In written testimony, the Department of Justice also explained that "[t]hese four bills address some of the risks caused by the growing worldwide terrorism problem, especially state-supported terrorism." Hearings at 46-47 (Prepared Statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division) (emphasis added).[15] The legislative history of section

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[14] While section 32(a) does not have the broad extraterritorial scope of section 32(b)(2), it does apply to acts against United States-registered aircraft abroad, and thus would apply with respect to any such aircraft shot down by Colombian or Peruvian authorities.

[15] In a colloquy between Senator Denton and Mr. Gilbert on the bill addressed to aircraft sabotage, Senator Denton commented that "we should not ignore the fact that in Libya a General Wolf, whose full name is

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32(b)(2) thus shows that the statute was intended to reach shootdowns by officials or agents of governments as well as by private individuals and organizations.

Because section 32(b)(2) applies generally to foreign governments, it must apply to shootdowns of foreign-registered civil aircraft by law enforcement officers or military personnel of the governments of Colombia and Peru. The statute contains no exemption for shootdowns in pursuance of foreign law enforcement activity; nor does it exempt shootdowns of aircraft suspected of carrying contraband.[16] USG personnel who aid and abet violations of section 32(b)(2) by the Colombian or Peruvian governments are thus themselves exposed to criminal liability by virtue of 18 U.S.C. § 2(a), see Part II B below.[17]

Our conclusion that section 32(b)(2) applies to governmental action should not be understood to mean that other domestic criminal statutes apply to USG personnel acting officially. Our Office's precedents establish the need for careful examination of each individual statute. For example, we have opined that USG officials acting within the course and scope of their duties were not subject to section 5 of the Neutrality Act, 18 U.S.C. § 960. See Application of Neutrality Act to Official Government Activities, 8 Op. O.L.C. 58 (1984) (Neutrality Act Opinion). In general terms, that statute forbids the planning of, provision for, or participation in "any military or naval expedition or enterprise to be carried on from [the United States] against the territory or dominion of any foreign prince or state . . . with whom the United States is at peace," 18 U.S.C. § 960; it does not explicitly exempt USG-sponsored activity. Our conclusion with respect to the Neutrality Act was based upon an examination of the legislative history of the Act, its practical construction over two centuries by Presidents and Congresses, and the judicial decisions interpreting it.[18]

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[15](...continued)
Marcus Wolf, set up and acts as the chief of Libyan Intelligence." Hearings at 81. In context, Senator Denton's comment seems to reflect his understanding that the legislation would reach state-sponsored attacks on civil aircraft or air passengers and the officials responsible for such attacks.

[16] Although the legislative history emphasizes the dangers of state-sponsored "terrorism," we do not understand the statute to exempt state activity that could arguably be characterized as "law enforcement." An action such as the Soviet Union's shooting down of KAL 007 could have been viewed as the enforcement of national security laws regulating overflights in militarily sensitive airspace, and thus distinguished from acts of terrorist violence. Nevertheless, we think that section 32(b)(2) would apply to such attacks on civil aviation.

[17] Section 32(b)(2) would also apply directly to USG personnel who themselves shot down foreign-registered civil aircraft, although on the facts as we understand them such conduct -- as distinct from aiding and abetting foreign governmental violations -- is not at issue here. (For further discussion, see Pt. V below.) Nothing in the legislative history of section 32(b)(2) suggests that that statute would not apply to USG personnel in proper cases as much as it does to foreign governmental personnel.

[18] We noted in the Neutrality Act Opinion that "the Act's purpose was to enhance the President's ability to implement the foreign policy goals that have been developed by him, with appropriate participation by
(continued...)

B.

The question we have been asked presupposes that USG personnel would not themselves directly carry out shootdowns of civil aircraft or encourage others to do so. Thus the lawfulness of USG activities and the potential liability of USG personnel, under the circumstances outlined to us, depend on the proper application of the federal aider and abettor statute, 18 U.S.C. § 2(a).

Section 2(a) does not itself define any criminal offense, but rather provides that a person who is sufficiently associated with the criminal act of another is liable as a principal for that act.

> Under the "classic interpretation" of this offense, "[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

United States v. Monroe, 990 F.2d 1370, 1373 (D.C. Cir. 1993) (quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)) (internal quotation marks and citations omitted).

Aiding and abetting liability for a crime can be usefully analyzed as consisting of three elements: "[1] knowledge of the illegal activity that is being aided and abetted, [2] a desire to help the activity succeed, and [3] some act of helping." United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991) (enumeration added), aff'd, 113 S. Ct. 933 (1993). All three elements must be present for aiding and abetting liability to attach. Id.

1. Knowledge of unlawful activity. A person must know about unlawful activity in order to be guilty of aiding and abetting it: "a person cannot very well aid a venture he does not know about." United States v. Allen, 10 F.3d 405, 415 (7th Cir. 1993). With respect to most or perhaps all countries to which the United States provides information or other

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Congress." Neutrality Act Opinion, 8 Op. O.L.C. at 72. Accordingly, we found that "it would indeed be anomalous" to construe that Act to limit what USG officials acting under Presidential foreign policy directives could lawfully do. Id. By contrast, interpreting the Aircraft Sabotage Act to reach such actors would not obstruct the statute's purpose, which in any case was not to ensure the President's ability to conduct a unified and consistent foreign policy unimpeded by private citizens' interferences. If anything, it would be contrary to the Aircraft Sabotage Act's policy of protecting international civil aviation from armed attacks to allow USG officials, but not those of any other country, to carry out such attacks. Furthermore, although it is often true that "'statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect,'" id. (quoting United States v. United Mine Workers, 330 U.S. 258, 272 (1947)), that maxim is "'no hard and fast rule of exclusion,' . . . and much depends on the context, the subject matter, legislative history, and executive interpretation." Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979) (quoting United States v. Cooper Corp., 312 U.S. 600, 604-05 (1941)).

assistance (other than Colombia and Peru), the absence of this first element of aiding and abetting eliminates entirely any possibility that the USG activities implicate 18 U.S.C. § 32(b). In the absence of some serious reason to think otherwise, the United States is entitled to assume that the governments of other nations will abide by their international commitments (such as the Chicago Convention) and customary international law. The fact that another government theoretically could act otherwise cannot render USG aid activities legally problematic. Furthermore, the United States is under no general obligation to attempt to determine whether another government has an as-yet unrevealed intention to misuse USG assistance in a violation of section 32(b). See United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990) ("Aider and abettor liability is not negligence liability."). Therefore, if a foreign nation with no announced policy or known practice of unlawful shootdowns did in fact use USG aid in carrying out a shootdown, that event would create no liability for the prior acts of USG personnel, although it probably would require a reevaluation of USG assistance to that country and, depending on the circumstances, might require changes in that assistance.

The same analysis, however, does not apply where the foreign state does have an announced policy or known practice of carrying out shootdowns that violate section 32(b)(2) -- precisely the situation with respect to Colombia and Peru. It is obvious that the United States has knowledge of Colombia's publicly avowed policy. We believe that the United States is equally on notice about Peru's de facto shootdown policy on the basis of the incidents that have occurred.[19] It appears to be settled law that the knowledge element of aiding and abetting is satisfied where the alleged aider and abettor attempted to escape responsibility through a "deliberate effort to avoid guilty knowledge" of the primary actor's intentions. Giovannetti, 919 F.2d at 1229. Someone who suspected the existence of illegal activity that his or her actions were furthering and who took steps to ensure that the suspicion was never confirmed, "far from showing that he was not an aider and abettor . . . would show that he was." Id. On the facts as presented to us, we think that the knowledge element is met with respect to Colombia and Peru unless there is a change in the policies of those countries.

2. Desire to facilitate the unlawful activity. "[T]he aider and abettor must share the principal's purpose" in order to be liable under 18 U.S.C. § 2. United States v. Fountain, 768 F.2d 790, 798 (7th Cir.), cert. denied, 475 U.S. 1124 (1986). The contours of this element in the definition of aiding and abetting are not without ambiguity, see Zafiro, 945 F.2d at 887, although as a general matter mere knowledge of the criminal activity (the existence of the first, knowledge element) does not in itself satisfy this second, purpose element. Many courts state the purpose element in terms of a "specific intent that [the aider and abettor's] act or omission bring about the underlying crime," United States v. Zambrano, 776 F.2d 1091, 1097 (2d Cir. 1985), and the Supreme Court's most recent restatement of the

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[19] For the purposes of the aiding and abetting statute, it is immaterial whether an aider and abettor knew of the unlawful activity because the primary actor told him or her, or simply took actions that made obvious what was happening. See generally Giovannetti, 919 F.2d at 1226-29.

aiding and abetting statute's reach suggests -- if it does not quite endorse -- this view. See Central Bank of Denver v. First Interstate Bank, 114 S. Ct. 1439, 1450 (1994) (section 2(a) "decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime") (citing Nye & Nissen, 336 U.S. 613).

At first glance it might appear that the United States could negate this element of aiding and abetting -- and thus render USG assistance to Colombia and Peru lawful and USG personnel free of potential liability under 18 U.S.C. § 32(b)(2) -- simply by announcing this Government's opposition to any violations of section 32(b) by anyone. It might seem that after such an announcement it would not be possible to say that USG personnel acted with a desire to help unlawful shootdowns succeed. However, "there is support for relaxing this requirement [of specific intent to bring about the criminal act] when the crime is particularly grave: . . . 'the seller of gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use'" would be guilty of aiding and abetting the buyer's subsequent use of the "cocktails" in an act of terrorism. Fountain, 768 F.2d at 798 (quoting with approval People v. Lauria, 251 Cal. App. 2d 471, 481 (1967) (dictum)). Where a person provides assistance that he or she knows will contribute directly and in an essential manner to a serious criminal act, a court readily may infer a desire to facilitate that act. See Zafiro, 945 F.2d at 887 (if someone "knowingly provides essential assistance, we can infer that [that person] does want [the primary actor] to succeed, for that is the natural consequence of his deliberate act").[20]

Were this a case in which a foreign government provided direct and material assistance to an attack upon United States civil aircraft, both our Government and, we believe, the courts of this country would view the offense against section 32(b)(2) to be of a very serious nature, and would adopt an expansive view of the "desire to help the [unlawful] activity succeed" that constitutes this element of aiding and abetting. United States v. Carson, 9 F.3d 576, 586 (7th Cir. 1993). As we understand the facts, USG assistance is critical to the ability of Colombia and Peru to effect shootdowns. USG personnel have been fully engaged in the air interdiction operations of each country, providing substantial assistance that has contributed in an essential, direct and immediate way (whether by "real time" information or otherwise) to those countries' ability to shoot down civil aircraft. Moreover, our assistance has been of a type and extent that Colombia and Peru would have

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[20] In general, USG information-sharing and other forms of assistance to foreign nations do not implicate the United States in those nations' actions because, among other reasons, the purpose element of aiding and abetting is not met. However important USG aid may be as an overall matter, the provision of information, resources, training, and support to a foreign nation would not in itself provide a basis for concluding that the United States intended to facilitate that nation's unlawful actions. Indeed, the general nature of such aid and its legitimate purposes (the furtherance of the diplomatic, national security, and democraticization goals of USG foreign policy) rebut any assertion that its purpose is to support the occasional or unexpected unlawful acts of recipient governments. See generally United States v. Pino-Perez, 870 F.2d 1230, 1237 (7th Cir.) (en banc) (aiding and abetting requires "a fuller engagement with [the primary actor's] activities" than accidental or isolated assistance creates), cert. denied, 493 U.S. 901 (1989).

difficulty in providing for themselves or in obtaining from other sources. In the absence of changes in the policies and practices of Colombia and Peru, there is a very substantial danger that the USG activities described to us meet the purpose element of aiding and abetting.

3. **Acts of assistance.** The application of the third element to the question we are considering is, we think, fairly straightforward. As the Supreme Court recently reiterated, aiding and abetting "'comprehends all assistance rendered by words, acts, encouragement, support, or presence.'" Reves v. Ernest & Young, 113 S. Ct. 1163, 1170 (1993) (quoting Black's Law Dictionary 68 (6th ed. 1990)). Gauged by this definition, many or most forms of USG activities that have been described to us could be fairly described as "act[s] of helping" Colombia or Peru to carry out a shootdown policy. That conclusion, when combined with our analysis of the knowledge and purpose elements, leads us to think that there is grave risk that the described USG activities contravene 18 U.S.C. § 32(b)(2).

C.

It has been suggested that the problems for USG information-sharing and other assistance to Colombia and Peru that are posed by 18 U.S.C. §§ 2(a) and 32(b) might be eliminated by seeking assurances from the governments of those countries with respect to their shootdown activities. Two possible forms of such an assurance have been posited: an assurance that Colombia and Peru would engage in no more shootdowns of civil aircraft, or an assurance that Colombia and Peru would make no use of information (or other aid) provided by the United States in effecting shootdowns. The argument would be that such assurances would negate either the first, knowledge element, or the second, purpose prong of aiding and abetting.

An initial point applies to both forms of assurance: to be of any legal significance, an assurance must be made by an official of the other government with authority to bind that government, and it must be deemed reliable by a high officer of the United States, acting with full knowledge of the relevant facts and circumstances. Assurances from subordinate officials could not reasonably be taken to represent a position that would be adhered to by other officials of that government. The acceptance of assurances that were not deemed credible in fact by USG officials might readily be characterized as a "deliberate effort to avoid [the] knowledge," Giovannetti, 919 F.2d at 1229, that the assurance did not represent the actual intentions of the other government. In light of the gravity of the issue, the decision to accept and act on such an assurance would be a policy decision of such significance that it could be appropriately made only by a very high officer of this Government.

A reliable assurance (as we have defined it) that the foreign government would carry out no shootdowns falling within the prohibition of section 32(b)(2) would, in our opinion, clearly negate the knowledge element of aiding and abetting. With such an assurance, there would be no known or suspected intention to effect unlawful shootdowns for USG officials to have knowledge of; put another way, the acceptance of such an assurance as reliable would

constitute a judgment that the foreign government was engaged in no criminal activity in this respect. If it subsequently became apparent that this judgment was mistaken, a reevaluation of the legal status of USG assistance would be necessary, but until and if evidence emerged that the other government intended to violate its assurance, USG aid of all sorts, including the provision of real-time flight information, would be lawful. For similar reasons, a reliable assurance that the foreign government would not carry out any unlawful shootdowns would eliminate any argument that USG officials had a "desire to help the activity succeed," Carson, 9 F.3d at 586, because it would represent a judgment that no unlawful activity was contemplated or under way.

A more problematic case is posed if the foreign government declined to renounce its shootdown policy but offered assurances that it would not use USG-supplied information or other assistance in carrying out shootdowns violating section 32(b)(2). (In such a case, the foreign government might carry out such activities using information or assistance obtained from other sources.) A bare assurance to that effect, without more, would be insufficient to remove the risk of contravening the statute, given what we understand to be the widespread use of USG-supplied information, the commingling of USG and foreign government information, and the temptation on the part of the foreign government's operational officers to make use of information or assistance extremely valuable to effecting their own government's law enforcement program.

We believe that there are conditions in which such assurances would be sufficiently reliable to permit the United States to continue to provide information and assistance to a foreign country's antinarcotics program even if that country declined to renounce its shootdown policy. First, the United States and the foreign country should agree that the sole purpose for which USG information and other assistance would be provided and used was to assist in the execution of a ground-based end game (searches, seizures and arrests), and that such information and assistance would not be used to target civil aircraft for destruction. Second, the agreement should establish mechanisms by which USG personnel would obtain detailed and specific knowledge as to how the USG-provided information and assistance were in fact being used, and thus be able to identify at an operational level any instances of non-compliance with the agreement. Third, the agreement should stipulate that if any incident should occur in which the foreign government's agents fired on a civil aircraft, USG personnel would be able to verify whether USG-provided information and assistance had been used in that instance, or whether the foreign country had employed only information and assistance from other sources in carrying out that operation. Finally, the agreement should provide for the termination of USG-supplied information and assistance in the event of material non-compliance. Were it possible to reach an agreement that incorporated such safeguards, we believe that it would insulate USG personnel from liability in the event the foreign government destroyed a civil aircraft.

III.

United States aid to Colombia and Peru might also implicate USG personnel in those governments' shootdown policies on a conspiracy rationale. See 18 U.S.C. § 371. The concept of conspiracy is distinct from that of aiding and abetting.[21] Aiding and abetting liability does not depend on an actual agreement between the primary actor and the aider and abettor.[22] In contrast, "agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact." Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975). In addition, liability for participation in a conspiracy may attach to someone even though he or she provides no material assistance toward the conspiracy's goals, and even if the primary criminal activity that is the object of the conspiracy never takes place. See, e.g., United States v. Townsend, 924 F.2d 1385, 1399 (7th Cir. 1991).[23] USG activities -- including information-sharing and technical advice -- that would be of material assistance in effecting shootdowns do not in themselves constitute an agreement between USG personnel and others to carry out shootdowns, but as we understand the facts the following are both true: (1) The United States intends, and has agreed with the governments of Colombia and Peru, to bolster the antinarcotics law enforcement activities of those countries. (2) The

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[21] In this memorandum, we focus on the potential for aiding and abetting liability for two reasons. First, it is unclear that under the circumstances outlined to us the relationship between the activities of USG personnel and shootdown actions by foreign governments could reasonably be deemed an "agreement" to violate 18 U.S.C. § 32(b)(2). A lesser degree of association with a criminal venture suffices to create aiding and abetting liability, however, and we think that a more serious argument can be made that some forms of USG assistance could fall within the definition of aiding and abetting. See United States v. Cowart, 595 F.2d 1023, 1031 (5th Cir. 1979) (the "'community of unlawful intent'" present in aiding and abetting, although "similar to the 'agreement' upon which the crime of conspiracy is based, does not rise to the level of 'agreement'"). In addition, and vitally, as stated in the text we believe the risk that USG personnel might plausibly be viewed as conspirators can and should be eliminated by the communication to foreign governments and USG operational personnel of the United States's firm opposition to any shootdowns of civil aircraft contrary to section 32(b)(2) or international law.

[22] The Seventh Circuit recently hypothesized a case illustrating this point.

> "Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members -- with whom he had no previous, or for that matter subsequent, dealings -- of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it."

Carson, 9 F 3d at 586 (quoting United States v. Zafiro, 945 F.2d at 884).

[23] Thus, USG personnel theoretically could be liable for conspiracy if their actions were construed as constituting an agreement with officials of the foreign government to carry out shootdowns and if the latter took some overt action toward accomplishing a shootdown. It would be unnecessary under the law of conspiracy for a shootdown to take place or for any USG actions actually to contribute to a shootdown.

governments of Colombia (expressly) and Peru (in practice) regard shootdowns as an integral part of their antinarcotics law enforcement activities. In those circumstances, courts might well view the distinction between USG assistance to their antinarcotics programs generally and USG assistance to the shootdown component of those programs as thin or non-existent, and thus construe ongoing USG assistance as evidence of an agreement. See United States v. Lechuga, 994 F.2d 346, 350 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 482 (1993).

We believe that it is imperative to make this Government's disapproval of shootdowns in violation of section 32(b) clear in order to eliminate any suggestion that USG personnel have entered into a conspiratorial agreement with foreign officials involving unlawful shootdowns since liability as a conspirator attaches even if the substantive unlawful act never takes place. In addition, we think that USG agencies should specifically instruct their personnel not to enter into any agreements or arrangements with the officials or agents of foreign governments that encourage or condone shootdowns. See generally Iannelli, 420 U.S. at 777-79.

IV.

This case is characterized by a combination of factors: it involves a criminal statute that explicitly has extraterritorial reach, that is applicable to foreign government military and police personnel, and that defines a very serious offense. Moreover, our Government is fully engaged in furnishing direct and substantial assistance that is not otherwise available to the foreign nations involved, and at least some of the USG personnel who provide that assistance have actual knowledge that it is likely to be used in committing violations.

Given this combination of factors, we conclude that, in the absence of reliable assurances in the sense defined above, USG agencies and personnel may not provide information (whether "real-time" or other) or other USG assistance (including training and equipment) to Colombia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.

Furthermore, we note that section 32(b)(2) prohibits the destruction of civil aircraft "while such aircraft is in service," as well as "damage to such an aircraft which renders that aircraft incapable of flight" (emphasis added). The statute defines "[i]n service" to "mean[] any time from the beginning of preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing." 18 U.S.C. § 31. Thus, USG assistance for certain operations against aircraft on the ground may come within the statutory prohibitions. Section 32(b)(2) does not preclude ordinary law enforcement operations directed at a plane's crew or cargo during those times.[24] It does, however,

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[24] For example, nothing in the section forbids the police to order the crew of a suspected drug trafficking plane to surrender upon landing, or to search or seize the plane or its cargo. (Consequential damage to the

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appear to forbid airborne law enforcers to bomb or strafe a suspect plane that has landed or that is preparing to take off.[25]

We will be pleased to co-operate with legal counsel for other agencies in evaluating specific programs or forms of aid under that standard.

V.

Our conclusions here must not be exaggerated. We have been asked a specific question about particular forms of USG assistance to the Colombian and Peruvian aerial interdiction programs. The application of the legal standard described here to any other USG programs -- including other programs designed to benefit Colombia or Peru -- will require careful, fact-sensitive analysis. We see no need to modify USG programs whose connection to those governments' shootdown policies is remote and attenuated, and (as noted above) we perceive no implications for USG assistance to any other foreign country unless another government adopts a policy of shooting down civil aircraft.

Other limitations on our conclusions should be noted. In certain circumstances, USG personnel may employ deadly force against civil aircraft without subjecting themselves to liability under section 32(b)(2). "The act is a criminal statute, and therefore must be construed strictly, 'lest those be brought within its reach who are not clearly included.'"[26] Although these circumstances are extremely limited, they may in fact arise.

Specifically, we believe that the section would not apply to the actions of United States military forces acting on behalf of the United States during a state of hostilities.[27] As

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[24](...continued)
aircraft would not constitute a violation of the statute.) Nor does the section forbid the police to use deadly force against a plane if they are themselves endangered by its crew's armed resistance to their legitimate orders. The police may also use force to rescue any hostages held aboard the plane.

[25] A valid law enforcement operation intended to seize a plane on the ground and arrest its crew and an attack on the airplane itself in violation of section 32(b)(2) may both result in the disabling or destruction of the aircraft. No liability under the section would attach, either to primary actors or to those who assist them, in the former circumstance. As described to us, however, the Colombian and Peruvian counternarcotics programs each encompass (potential) actions that would intentionally fall within the latter, forbidden category. Obviously, on different facts we could reach a different conclusion.

[26] Export Sales of Agricultural Commodities to Soviet Union and Eastern European Bloc Countries, 42 Op. Att'y Gen. 229, 232 (1963) (quoting United States ex rel. Marcus v. Hess, 317 U.S. 537, 542 (1943)).

[27] We do not mean to confine a "state of hostilities" to some specific legal category, such as a state of declared war in the constitutional sense, see U.S. Const. art. I, § 8, cl. 11, or a situation such as to trigger the reporting requirements of the War Powers Resolution, see 50 U.S.C. § 1543(a).

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discussed above, section 32(b)(2) was intended to implement the United States's obligations under the Montréal Convention. That Convention does not appear to apply to acts of armed forces that are otherwise governed by the laws of armed conflict.[28] (The general rule under the law of armed conflict is that civil aircraft are immune from attack unless they are being used for military purposes or pose an immediate military threat.[29]) We do not think that section 32(b)(2) should be construed to have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict. We note specifically that the application of section 32(b)(2) to acts of United States military personnel in a state of hostilities could readily lead to absurdities: for example, it could mean in some circumstances that military personnel would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution. Unless Congress by a clear and unequivocal statement declares otherwise, section 32(b)(2) should be construed to avoid such outcomes.[30] Thus, we do not

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[28] International agreements such as the Montréal Convention are generally concluded with a view to regulating ordinary, peace-time conditions. Accordingly, one treatise writer has stated it to be the general rule that "[i]f, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention." Bin Cheng, The Law of International Air Transport 483 (1962) (quoting The S.S. Wimbledon (Gr. Brit. et al. v. Germ.), 1923 P.C.I.J. (ser. A) No. 1, at 36 (Aug. 17) (dissenting opinion of Judges Anzilotti and Huber)). Accord Preliminary Objections Submitted by the United States of America, Case Concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) (March 4, 1991), pp. 200, 203 ("the Montreal Convention was intended to prevent and deter saboteurs and terrorists from unlawfully interfering with civil aviation and endangering innocent lives. The drafters of the Convention did not discuss the actions of military forces acting on behalf of a State during hostilities, and there is no reason to believe that they intended the Convention to extend to such actions. . . . Infringements on the laws of armed conflict through international agreements primarily addressing situations other than armed conflict are not to be presumed. There is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in armed conflict. If they had so intended, they would have had to address a myriad of issues relating to acts by military forces."). This conclusion is corroborated by article 89 of the Chicago Convention, which declares in part that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals." See David K. Linnan, Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility, 16 Yale J. Int'l L. 245, 267 (1991) ("the nature of the Montreal Convention as an anti-hijacking and sabotage treaty seems to preclude its application to the acts of armed forces governed by the law of armed conflict under article 89 of the Chicago Convention"). See also 7 Green Hackworth, Digest of International Law 552-55 (1943) (describing earlier practice and theory).

[29] See Department of the Air Force, International Law -- The Conduct of Armed Conflict and Air Operations, ¶ 4-3(a)(1), (b) (1976); Comment, Airborne Drug Trafficking Deterrence: Can a Shootdown Policy Fly?, 38 UCLA L. Rev. at 1321.

[30] Cf. United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-87 (1869) (holding that statute punishing obstruction of mail did not apply to temporary detention of mail caused by carrier's arrest for murder); Nardone v. United States, 302 U.S. 379, 384 (1937) (public officers may be implicitly excluded from statutory language

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think the statute, as written, should apply to such incidents as the downing on July 3, 1988 of Iran Air Flight 655 by the United States Navy cruiser Vincennes.[31]

Furthermore, even in cases in which the laws of armed conflict are inapplicable, we believe that a USG officer or employee may use deadly force against civil aircraft without violating section 32(b)(2) if he or she reasonably believes that the aircraft poses a threat of serious physical harm to the officer or employee or to another person.[32] A situation of this kind could arise, for example, if an aircraft suspected of narcotics trafficking began firing on, or attempted to ram, a law enforcement aircraft that was tracking it. Assuming that such aggressive actions posed a direct and immediate threat to the lives of USG personnel or of others aboard the tracking aircraft, and that no reasonably safe alternative would dispel that threat, we believe that the use of such force would not constitute a violation of section 32(b)(2).[33]

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[30](...continued)
embracing all persons because "a reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").

[31] See Marian Nash Leich, Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis, 83 Am. J. Int'l L. 319, 321-22 (1989) (quoting Congressional testimony of State Department Legal Adviser Sofaer that "[i]n the case of the Iran Air incident, the damage caused in firing upon #655 was incidental to the lawful use of force. . . . The commander of the U.S.S. Vincennes evidently believed that his ship was under imminent threat of attack from a hostile aircraft, and he attempted repeatedly to identify or contact the aircraft before taking defensive action. Therefore, the United States does not accept legal responsibility for this incident . . . .").

[32] See Tennessee v. Garner, 471 U.S. 1, 11 (1985) (discussing constitutionally reasonable use of deadly force); New Orleans and Northeastern R. Co. v. Jopes, 142 U.S. 18, 23 (1891) ("the law of self-defence justifies an act done in honest and reasonable belief of immediate danger").

[33] To the extent that section 32(b)(2) does not apply to the use of deadly force by USG military or other personnel in the circumstances described above, it would of necessity be inapplicable as well to the actions of similarly situated personnel of the Colombian or Peruvian governments. That is, such foreign governmental agents could employ deadly force against civilian aircraft in the same circumstances in which USG personnel were able to do so. USG personnel who assisted foreign government agents in such lawful and legitimate acts of self-defense would of course not be subject to liability, since one cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime. See Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963).

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